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CONVEYANCER'S NOTEBOOK.

We have tried to avoid the danger of the journal being almost completely occupied with topical matters that we hope have but an ephemeral interest. It was originally intended that this volume should have had a series of articles on a subject of practical importance and considerable difficulty. Circumstances decided us to abandon this project in favour of articles on the Emergency Legislation, and to add only articles on isolated topics. As it is hoped that this spate of emergency statutes and rules has now subsided we propose to return to the previous scheme for the next volume without of course withdrawing our attention from the current emergency. In the next volume, therefore, we hope to have space for a series of articles on Concurrent Interests in Land, as experience shows that practical difficulties are constantly arising from undivided shares or joint tenancies.

Law Reports.—The Commission on Law Reports has now issued its report. It is a disappointing effort because it is almost entirely negative except for the dissentient report of Professor Goodhart which is the most stimulating part of the work. Its one really substantive proposal is that the Courts shall insist on citation from the Law Reports if a case is reported there. If the continuance of the other reports is desirable it is difficult to see why this recommendation should be made. If its purpose is to make subscription

to the Law Reports necessary for all advocates whatever the other reports to which they subscribe this appears to the writer as an unnecessary hardship. This is peculiarly true when it is remembered that the number of sets of the Law Reports is limited and many practitioners have for a long time subscribed to the Law Journal Reports, whose reports have in fact been equally revised by the Judges for the last forty years. If there is a substantial difference between the report cited and the Law Reports there may be ground for preferring the latter, but to recommend that in every case the report cited, which presumably means read, should be from the Law Reports appears to impose a burden upon the practitioner, especially the country practitioner, which is quite unreasonable.

The real difficulty of the present time in the multiplicity of reports lies in the expense from repetition and the problem of ensuring that all possible cases have been consulted. The aspect of expense is waved aside as being inherent in the publication of reports as a matter of commercial enterprise. This is not the case because it cannot be divorced from the second problem. The Report seems to assume that every practitioner has ready access to a complete library of law reports without having to subscribe personally. Alternatively he has the privilege of paying £25 a year for reports and finding room for them. The sum just mentioned does not of course cover all the reports, but the remainder are "specialist reports" with which he is presumed not to be concerned. One is tempted to wonder if the eminent members of the profession who comprised the Commission have any real conception of the earnings of younger or less eminent members of the profession, particularly in country districts. On the other hand, they may have thought that such a knowledge of the law is not necessary to the conduct of cases in the inferior Courts. This does not coincide with the writer's experience. Humble matters may involve problems of law quite as difficult as those arising from the most expensive forms of litigation.

One other aspect of the matter seemed to the writer to receive inadequate attention. The difficulty of finding all the relevant cases is very great. Years of struggle with digests has taught him that a digest is no satisfactory alternative to an index. Digests are valuable, but the practice in guessing necessary to find relevant cases requires a long and arduous experience which never attains perfection. If we are to rely upon digests then they should be coupled with a most exhaustive index of subject-matter and the digest should not amount to little more than a repetition of the headnote which is not always a sure guide to the contents of

the case. How much easier it would all be, if there was one proper series of reported decisions with an adequate digest and index, it is not easy to foretell, but the gain would be tremendous. In the meantime it is hoped that the publishers may increase the efficiency of the digests by giving them more the effect of indices as well.

It looks as though little or nothing can come from this Report. But the Report makes interesting reading and deserves a careful study. It is hoped that on another occasion fuller consideration may be given to it and to what it omits, namely the difficult position of the country practitioner for whom litigation is not a whole-time task but an occasional necessity.

H.M. Land Registry.

Land Charges Department—Agricultural Credits Department—Middlesex Deeds Registry.

The Chief Land Registrar gives notice that the Land Charges and Agricultural Credits Departments and the Middlesex Deeds Registry will be removed from Lion House, Red Lion Street, High Holborn, W.C.1, to the Land Registry in Lincoln's Inn Fields, W.C.2, on June 3, 1940.

All communications relating to these Departments should be addressed from that date to the Land Registry in Lincoln's Inn Fields, where in future all registrations and searches in these Departments or Registry will be conducted.

HIRE-PURCHASE AND THE EMERGENCY LEGISLATION.

By P. H. Thorold Rogers, Barrister-at-Law.

The practice of financing the purchase of all kinds of commodities by means of what is compendiously called "hire-purchase" has now grown to be so common that it may rightly be assigned a separate place and a distinctive title in any work on contract or personal property. But despite the ubiquity of these transactions and the comparative frequency with which they fall to be considered by the Courts they still present many unsolved problems, and there is as yet no completely satisfactory and universally accepted analysis of their nature. Thus although it has always been recognised that a properly drawn hire-purchase agreement is not an agreement to buy but is merely a contract of hire with an option of purchase (*Helby* v. *Matthews*, [1895] A. C. 471), it has on the other hand also been held that it is, so far as the person who lets is concerned, a conditional sale to which, therefore, the provisions of the Sale of Goods Act, 1893, are applicable : *Felstone Tile Co.* v. *Wingate*, [1936] 3 All E. R. 473. Two recent decisions on the financial aspect are also of importance; in *Transport and General Credit Corporation* v. *Morgan*, [1939] 1 Ch. 531, Simonds, J., held that the practice was now so well recognised and established as a specialised method of finance that it could not be attacked as a moneylending transaction under the Moneylenders Acts, 1900—1927, whilst on the other hand in *Menzies* v. *United Motor Finance Corporation, Ltd.*, Goddard, L.J., with the apparent concurrence of the rest of the Court of Appeal, described it as in effect the loan of money to, or the financing of, the dealer by the hire-purchase company : (1940), 56 T. L. R. 454. It is respectfully suggested that this is not correct and that although it is of course true that the dealer would not enter into the transaction unless he was paid cash it is the customer and not the dealer who is financed (*a*).

Although it is but seldom realised by the lay public and not always by the legal practitioner, there are in fact two quite distinct

(*a*) The decision related to a normal hire-purchase agreement in which the property was sold to a hire-purchase company and then let by them. Entirely different considerations will apply where the dealer himself lets direct to the customer and then obtains some finance on the security of the agreement.

and fundamentally different methods of financing the acquisition of goods. Both are in common use to-day. The first is the instalment contract, often called the " credit sale " agreement, in which there is an out-and-out sale to the customer on terms which provide for payment in instalments.

It is a serious but very common mistake to assume that the essential feature of such an agreement is that the property in the goods in question immediately passes to the customer. That it will do so in the absence of any agreement to the contrary is obvious : Sale of Goods Act, 1893, s. 18. But it is the almost invariable practice so to draw the agreement that the property remains in the seller until the final instalment is paid (*b*). This is of no great protection to him, however, for he cannot take a licence to seize since this would convert the agreement into an unregistered and invalid bill of sale. Nor can he prevent the customer from giving a good title to an innocent purchaser under section 25 of the Sale of Goods Act.

In the real hire-purchase contract the goods are let to the customer with an option to purchase. Here also there is another common fallacy, namely, that the agreement must contain a clause entitling the hirer to determine it at any time. This notion, which is completely erroneous, can probably be traced to certain *dicta* in *Helby* v. *Matthews*, [1895] A. C. 471. In actual fact it is quite sufficient that there should be a hiring for a fixed term with no power to break it during that term followed by an option to purchase exercisable during or at the end of it (*c*). The material factor is the absence of any obligation on the hirer to buy; so long as he has merely an option to purchase neither the Bills of Sale Acts nor the Sale of Goods Act will apply. Hire-purchase transactions to-day can themselves be classified into two main sub-heads or classes. On the one hand are the ordinary type known now to every practitioner in which the goods are sold by a dealer to the hire-purchase company and are then let by that company to the hirer; whilst on the other are the almost equally common but far less well known or understood transactions in which the dealer himself lets direct to the customer and then obtains an advance from the hire-purchase company on the security of the agreement. It is not generally known that in certain financial circles hire-purchase agreements in the bulk are dealt in as a special form of commercial " paper ".

Before attempting to analyse the effect of the Emergency Legislation on these different classes of transactions it is necessary

(*b*) See, *e.g.*, *The Anchor Line*, [1937] 1 Ch. 1.
(*c*) *Belsize Motor Supply Co.* v. *Cox*, [1914] 1 K. B. 244.

to examine in a little greater detail the exact manner in which the latter type of hire-purchase transaction is in fact completed.

There are several alternative methods; in *Modern Light Cars* v. *Seals*, [1934] 1 K. B. 32, Roche, J., could find nothing objectionable in a system under which the dealer took from the customer bills of exchange for the amount of and payable on the dates of the instalments under the agreement. It is not at all an uncommon variant on this method to take post-dated cheques in a similar manner. The principal disadvantage of employing this device is that it involves disclosing the financing arrangement to the customer. Complete secrecy can be obtained by the use of other methods.

It is possible for the dealer after he has obtained the customer's signature to the agreement to assign to the hire-purchase house his reversionary interest in the goods and all his rights under the agreement (*d*). The requisite notice of assignment is usually held in suspense and there is some doubt as to whether it is possible to assign the licence to seize : *Re Isaacson, ex p. Mason*, [1895] 1 Q. B. 333. Alternatively the dealer may assign the book debts arising out of the agreements retaining the ownership and the licence to seize for himself. In such circumstances the dealer may be asked to give post-dated cheques or to accept bills of exchange : *Olds Discount Co., Ltd.* v. *Playfair*, [1938] 3 All E. R. 275.

War Damage.

It is now proposed to deal with the effect of the Emergency Legislation and the war generally on these different types of transaction. First as to war damage. The destruction, total or partial, of goods comprised in these agreements is an obvious possibility which has been partially dealt with by the Liability for War Damage (Miscellaneous Provisions) Act, 1939. Section 1 of this Act applies only to bailments and is therefore of no interest when one is considering contracts of the credit-sale type. A transaction in which goods are delivered in return for money or money's worth is not a bailment : in the former case it is a sale and in the latter an exchange : *South Australian Insurance Co.* v. *Randell* (1869), L. R. 3 P. C. 101. Section 2 looks at first sight more helpful. It provides as follows : " Where, whether before or after the commencement of this Act—

(a) any goods have been delivered to any person (hereafter in this section referred to as ' the buyer ') on approval or on sale or return or other similar terms; and

(*d*) *Re George Inglefield, Ltd.*, [1933] Ch. 1.

(b) an obligation is imposed on the buyer by the terms of any contract, or by any custom, to pay the price of the goods in the event of their being lost or damaged before the property therein would otherwise have passed to the buyer;

the obligation shall be deemed not to extend to loss or damage by war."

It will be observed, however, that these two sub-clauses are linked conjunctively and are therefore not independent. The relief afforded by the section is confined to the transactions mentioned in "(a)". The wording of this clause closely follows that of section 18 of the Sale of Goods Act, 1893, and must therefore be given a similar meaning. A credit-sale transaction of the sort described above is obviously incapable of being properly described as a sale on approval or on sale or return. At first sight it might be thought that the words "or other similar terms" might be extended to embrace such a transaction, but they have received a very restricted interpretation in the past and any argument on these lines would be doomed to failure: *Weiner* v. *Gill*, [1906] 2 K. B. 574; *Edwardes (Percy), Ltd.* v. *Vaughan* (1910), 26 T. L. R. 545; *Kempler* v. *Bravington, Ltd.* (1925), 133 L. T. 680.

The inevitable conclusion is that no relief is given to a customer in such a transaction notwithstanding that the article in question is destroyed when only a very small proportion of the price has been paid. Nor would this be a proper case for relief under the Courts (Emergency Powers) Act, 1939, for though there is a tendency in some county courts to use the Act as a measure of general equity it is clear that the only proper consideration under it is the ability of the debtor to pay and the extent to which that ability has been affected by the war: *A* v. *B*, [1939] W. N. 376; *Re Griffiths*, [1940] 1 All E. R. 528.

The possible destruction of goods comprised in a hire-purchase agreement has been provided for: Liability for War Damage (Miscellaneous Provisions) Act, 1939, s. 1. This Act was based on the report of the Committee on Liability for War Damage to the subject-matter of Contracts (1939 Cmd. 6100). The Committee quoted on page 10 of their Report the well-known passage from the judgment of Blackburn, J., in *Taylor* v. *Caldwell*, 3 B. & S., at p. 838:—

> "It may we think be safely asserted to be now English law, that in all contracts of loan of chattels or bailments, if the performance of the promise of the borrower or bailee to return the thing lent or bailed becomes impossible because it has perished, this impossibility (if not arising from the fault of the

borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to re-deliver the chattel."

Applying this principle they considered that "the contract of hire-purchase (at any rate where there is no obligation to complete the purchase) is frustrated if the goods are totally destroyed by the happening of war damage or so substantially damaged as to render them unfit for use". It is respectfully submitted that the Committee have failed to give sufficient consideration to the very peculiar nature of hire-purchase transactions. A rather similar argument was advanced in *Karflex* v. *Poole*, [1933] 3 K. B. 251, but was rejected by a Divisional Court. In the course of his judgment Goddard, J. (as he then was), said : "Now it does not seem to me by any means to follow that the doctrines which were applied to ordinary simple bailments in bygone days apply to this modern class of bailments which has in it, not only the element of bailment, but also the element of sale. I say the element of sale, because, of course, it is well known, since the leading case of *Helby* v. *Matthews*, [1895] A. C. 471, that the hire-purchase agreement, as drawn at present, is not a true contract of sale but an option of sale. Therefore it is a contract between the parties which is partly giving an option of sale and partly creating a bailment, and I think one has only to consider that for a moment to see how fallacious it would be to try to fuse that with the hard-and-fast rules with regard to bailments which were laid down before any contract of hire-purchase was contemplated." The peculiar nature of a hire-purchase contract was also recognised by the Court of Appeal in *Whitely* v. *Hilt*, [1918] 2 K. B. 808.

It is suggested that the contract of hire-purchase partakes more closely of the nature of a sale than of a genuine bailment and that therefore it is not right to apply in connection with an alleged frustration the principles which are normally applicable to a bailment.

However, the point is now largely academic, because the Committee recommended and Parliament subsequently enacted provisions designed to protect the hirer. The provisions are to be found in section 1 of the Liability for War Damage, etc., Act, 1939. They are designed to deal not only with the liability to continue to pay instalments notwithstanding the destruction of the property but also with any obligation to insure, repair or replace it, to restore it in good repair or even to pay compensation for its loss or damage.

In ordinary cases the statutory protection only applies to obligations which are not expressly related to war by the terms of the contract. In other words, if the parties expressly agree

(whether before or after the beginning of the war) to continue to pay despite war damage, to insure against war risks or to repair such damage, they will be bound; but so long as the agreement is general and does not expressly include war risks it " shall be deemed not to extend to loss or damage by war ". It is immaterial what is the source of such a general obligation, for the Act is equally efficacious if the obligation is imposed " by the provisions of any contract or by any enactment, rule of law or custom ". In a few exceptional cases—namely those to which the Hire-Purchase Act, 1938, applies—the protection is wider and will extend to confer relief from any such obligation in respect of war damage whether or not it was expressly related to such damage in the contract. The result of this is that in contracts outside the latter Act the hire-purchase company can, by proper draughtsmanship, throw the whole risk of war loss or damage on to the hirer, but in cases to which the Act applies he cannot do so. But even in the latter case the hire-purchase company will itself be relieved from any contractual obligation of the sort referred to if the property suffers war damage, for the relief is conferred by the Liability for War Damage, etc., Act equally on both parties to every bailment (section 1 (1)).

If the occurrence of war damage becomes at all common it will be a matter of some concern to the established hire-purchase companies to consider the form of their standard contracts and in particular to determine exactly what are the contracts to which the Hire-Purchase Act, 1938, applies. The Act itself states that it applies wherever the hire-purchase price does not exceed a certain figure; this is fixed at £50 for motor vehicles and railway rolling stock, £500 for livestock and £100 in all other cases. Hire-purchase price is defined in the latter Act as " the total sum payable by the hirer under a hire-purchase agreement in order to complete the purchase of goods to which the agreement relates, exclusive of any sum payable as a penalty or as compensation or damages for a breach of the agreement ". Some doubt has been thrown upon the meaning of these words, and hence upon the extent of the Act, by the recent decision of the Court of Appeal in *Menzies* v. *United Motor Finance Corporation, Ltd.*, [1940] 1 All E. R. 549. In this case the owner of a vehicle sold it to a dealer in order that the latter might sell it to a hire-purchase company which might in its turn let it back again on hire-purchase terms to the owner. In effect, this was a loan on the security of the car, but as the proper procedure was carried out it was in no way illegal. However, to make the transaction look more normal there was inserted into the agreement in addition to the instalments which were to be paid

to the finance house a further sum called the 'first payment' which was not in fact ever paid but which was added to the total figure in the agreement. It was held that the total hire-purchase price on these facts was the amount which the hirer was actually liable to pay to the hire-purchase company and that in calculating this no reference could be made to the notional first payment. If the decision stopped there it is submitted that it could not be challenged, but Goddard, L.J., went very much further. In his view the total hire-purchase price is always the amount actually payable by the hirer to the hire-purchase company, no regard being had to any other sum which the hirer may be liable to pay to some other person. It is, of course, the usual practice in almost all ordinary hire-purchase contracts for the hirer to make a first payment to the dealer direct, and this has in the past always been regarded as indirect payment to the company, for the dealer gives credit for it to the company when demanding the purchase price of the goods. The result of applying the *dictum* of Goddard, L.J., will be drastically to extend the scope of the Act and it is submitted that it is fallacious. In paying for the goods the hire-purchase company pays the full price to the dealer, payment being made in part by the customer and in part by the company. But the whole matter is merely a matter of bookkeeping, and when resolved into its essentials is found to be a purchase for the full price and a letting in return for a first payment followed by a number of instalments at stated intervals. However, as the matter now stands it is one of very considerable doubt, and hire-purchase companies will be well advised to consider their position in all borderline cases with some care.

So far as clauses dealing with war damage are concerned there is no reason why they should not be inserted into all agreements. The Act does not render them illegal in cases to which it applies; it merely provides that they shall be of no effect (section 1).

It is also worthy of note that the protection afforded by the Act to the hirer will be lost if the goods are kept or transported in a manner or at a place which is contrary to the terms of any contract relating to the custody or transport thereof unless the bailee satisfies the Court that he had reasonable ground for believing that the goods were less likely to be lost or damaged than if he had observed the terms of his contracts (section 1 (2)). For some reason which is unknown to the author but which may be an oversight the sub-section just quoted, which deprives the bailee of the protection of the Act in certain circumstances, does not refer at all to the obligation to insure against war risks or to continue to pay the instalments notwithstanding the destruction of the

subject-matter. The result would seem to be that the hirer will be protected from any liability under those heads even though he has broken the contract by keeping or moving them improperly. Hire-purchase concerns can hardly be considered unreasonable if they require their customers to contract out of this protection.

Courts (Emergency Powers) Act.

Hire-purchase contracts are also considerably affected by the Courts (Emergency Powers) Act, 1939, s. 1 (2) : No person " may exercise any remedy which is available to him by way of . . .

(ii) taking of possession of any property . . .

(iv) the realisation of any security . . ."

It is thought that the materiality of this section to the present subject is two-fold. In the first place it places a considerable restriction (in addition to those already imposed by the Hire-Purchase Act, 1938, in the cases to which it applies) upon the resumption of possession by a hire-purchase company or by any other person who has let goods on hire-purchase terms. On the other hand, it will be observed that the Act is limited in its application to the taking of possession as a result of the *exercise of any remedy*. Although the point is by no means free from doubt it is submitted that where the hire-purchase company is in a position to rely solely on its common law rights as an owner and not at all on the agreement the Act will not apply and the resumption of possession (provided no other principle of law is infringed) will be perfectly lawful. Most hire-purchase agreements contain two clauses, one of these entitles the company to determine the *hiring* if at any time the hirer defaults in his obligations, whilst the other entitles them to determine the agreement as a whole. The efficacy of the latter method as a device for depriving landlords of the fruits of a distress, provided the determination preceded the distraint, was established by *Smart Brothers* v. *Holt*, [1929] 2 K. B. 303, though the later decision in *Times Furnishing Co.* v. *Hutchings*, [1938] 1 K. B. 775, shows that the doctrine of reputed ownership may give rise to further difficulties which can only be overcome by giving express notice to the hirer of the fact of revocation.

If the former method of determination is employed the agreement remains alive and the right of the company to resume possession is clearly a remedy for the exercise of which the leave of the Court will be necessary. But if the agreement as a whole is determined it is submitted that the company is then entitled to resume possession (subject to the Hire-Purchase Act, 1938 : cases

to which it applies) as a result of their legal title and that this is not the exercise of a remedy at all.

It may be doubted how far it is worth while to put this to the test, for substantial damages may be awarded if the provisions of the Act are in fact disregarded : *Anchor Trust Co., Ltd.* v. *Bell*, [1926] Ch. 805. Nor will it suffice to obtain the hirer's consent for it has recently been decided that the protection of the Courts (Emergency Powers) Act cannot be waived : *Soho Square Syndicate, Ltd.* v. *Pollard & Co., Ltd.*, [1940] 2 All E. R. 601.

The effect of the Courts (Emergency Powers) Act does not stop there. The post-dated cheques and the bills of exchange which are so often given as collateral security to a hire-purchase agreement are a security the realisation of which requires the leave of the Court under section 1 (2) (a) (iv). It is thought that it is not possible to describe the presentation of such documents or their negotiation as a sale by a mortgagee in possession. If this could be done no leave would be necessary, for the Act by section 1 (2) proviso (b) enacts that no leave shall be needed for " any power of sale of a mortgagee in possession of property other than land, where the power of sale has arisen and notice of the intended sale has been given before the commencement of this Act; ".

During the four years' war the rather similar wording of the 1914 Act was considered by the House of Lords in *Foster* v. *Barnard*, [1916] 2 A. C. 154, where it was held (approving *Ziman* v. *Komata Reefs Gold Mining Co.*, [1915] 2 K. B. 163) that a stockbroker in possession of securities which he had bought for a client had a lien on them for the price which amounted to an equitable mortgage and so authorised him to sell without the leave of the Court. The importance of this principle is much weakened to-day by the introduction into the present Act of the dual requirement that the power of sale should have become exercisable, and notice of its intended exercise should have been given, before the commencement of the Act (*e*).

As the Act commenced on September 2, 1939 (S. R. & O. 1939, No. 1135), there are not likely to be many cases to which the exception applies. But it is believed that there were a number of stockbrokers' sales during September, 1939, which could not be justified.

It is perhaps pertinent to observe that bills of exchange (which, of course, includes cheques : Bills of Exchange Act, 1882, s. 73)

(*e*) The relevant words of the 1914 Act were as follows: " . . . realise any security (except by way of sale by a mortgagee in possession) . . . except after such application to such Court, etc. . . ."

and promissory notes are not "securities" within the meaning of the Defence (Finance) Regulations, and their *issue* is therefore not subject to restrictions.

Compensation for requisitions.

Goods which are comprised in hire-purchase agreements are as liable to be requisitioned by the authorities as any others. There is here an interesting and illogical distinction between the procedure to be followed in claiming compensation when the requisitioning authority is one of the armed forces acting under the Army Act, the Air Force Act, 1925, or the Navy (Billeting) Act, 1914, and when it is some other branch of the executive acting under the Defence (General) Regulations or the Prerogative. In the former case it appears that compensation is payable to the hirer as if he were the owner of the article in question. The real owner, the dealer or hire-purchase finance house which has let the article to him, can then claim from him a share of the compensation as money had and received: *British Berna Motor Lorries, Ltd.* v. *Inter-Transport Co., Ltd.* (1915), 33 T. L. R. 200. The compensation payable in such cases is the fair market value at the time and place in question, the subject having a right of application to the county court for the Judge's certificate as to the proper amount: Army Act, s. 113. If the compensation paid is equivalent to the hire-purchase price of the goods requisitioned there will be no difficulty in apportioning it between the two interested parties, but where it is less it is submitted that the proper course is to divide it proportionately between them in the ratio which the instalments already paid bear to those which still remain due (*f*). This would seem to be in accordance with the view of the respective interests of the parties which was taken by the Court of Appeal: *Whiteley* v. *Hilt.*

Although there are, of course, many authorities dealing with the effect of a requisition on a charter of a ship (*g*) there does not appear to be any authority to guide one to determine what would be its effect on a contract of hire-purchase. The point was not raised in *British Berna Motor Lorries, Ltd.* v. *Inter-Transport Co., Ltd.* (*supra*), but it is difficult to see how the claim there could have succeeded except on the assumption that the contract was frustrated. If the contract remained intact the proper course was

(*f*) See *Chinese Engineering and Mining Co.* v. *Sale & Co.*, [1917] 2 K. B. 599, 605, where similar difficulties were discussed in relation to a chartered ship as between the owners and the charterers, cf. *Elliott Steam Tug Co., Ltd.* v. *Duncan & Sons, Ltd.* (1918), 34 T. L. R. 583.

(*g*) *Tamplin* v. *Anglo-Mexican, etc., Co., Ltd.*, [1916] 2 A. C. 397; *Bank Line* v. *Capel & Co.*, [1919] A. C. 435.

to insist on payment of the remaining instalments as they fell due. In the absence of any authority it can only be submitted that on the principle of *Karflex* v. *Poole*, [1933] 2 K. B. 351, a contract of hire-purchase partakes too closely of the nature of a sale to be frustrated.

The compensation for a requisition by the armed forces should be offered at the time, and if in fact such an offer is made, whether or not it is accepted, it will be deemed to be the reasonable price unless either an actual application is made to the county court for the Judge's certificate as to the price or notice of intention to make such an application is given to the authorities : Army Act, s. 115. Application to the county court is made by originating application under Order VI, r. 4, service being in accordance with the special provisions of Order XLVI, r. 2 (*i.e.*, by post to the Admiralty, War Office or Air Ministry as the case may be). Instead of actually applying to the county court an appeal may be lodged to the Appeals Adjustment Office, Regent's Park Barracks, Albany Street, N.W.1; this will operate as notice of intention to apply to the county court.

It is most important to observe that either the actual application or the notice of intention to apply must be served within three weeks of the requisition.

Where, however, the requisition rests on the emergency legislation or on the prerogative a completely different procedure is prescribed by the Compensation (Defence) Act, 1939. Claims must then be made within six months on a special form which is scheduled to the Order made under the Act : S. R. & O., 1939, No. 1296. Interest accrues due from day to day (section 10) at 4 per cent. until February 1, 1940, and thereafter at 2 per cent.; and disputed claims fall to be determined by the special Tribunal which has been constituted by the Act but which has not, as yet, assumed its functions.

A curious distinction is drawn in the Compensation (Defence) Act between a requisition and an acquisition. The use of the former to connote the compulsory seizure of temporary possession has ample precedent and it is in this sense alone that it is used in connection with land. But in the case of chattels other than vessels, vehicles and aircraft it is used as synonymous with acquisition. Thus we find that the Act provides for compensation for the temporary compulsory user of the latter kinds of chattels (section 4) but that it also provides separately for their compulsory acquisition. The compensation in the first case is payable to the owner (section 4 (2)) but where another person is entitled to possession by virtue of a subsisting contract of hiring the owner

will hold whatever he receives as a trustee for the latter (section 4 (3)). It is difficult to understand the exact force of the phrase a "subsisting" contract unless it be taken to mean a contract which is not frustrated by the requisition. However, it is submitted that this is not relevant to the present inquiry as there is a separate section which deals expressly with the relations *inter se* of hire-purchase company and customer (section 13); this fact strongly suggests that when section 4 (3) refers to a contract of hiring it must be read as referring to a contract of hire *simpliciter* and not to one of hire-purchase.

For the compulsory requisition of vessels, vehicles or aircraft the compensation is "a sum equal to the amount which might reasonably be expected to be payable by a person for the use of the vessel, vehicle or aircraft during the period of the requisition, under a charter or contract of hiring whereby he undertook to bear the cost of insuring, maintaining and running the vessel, vehicle or aircraft". There is nothing in the Act to prevent hire being claimed at a rate which is enhanced by the emergency if this is in fact a reasonable rate at the time. For the acquisition of these chattels compensation is payable on exactly the same basis as that provided for the requisition of all other chattels, namely the market value without taking into account any appreciation of value due to the emergency (sections 4 (7) and 6).

In all cases the compensation moneys are payable to the owner—that is, in the case of a hire-purchase contract to the hire-purchase company or dealer. The hirer is, however, entitled to a share in it and may apply to the Tribunal under section 13 in which case the Tribunal has power to apportion the total compensation payable between the two parties "in such manner as appears to it to be just". Presumably it will do so in accordance with the principles which have been indicated in discussing the procedure under the Army Act.

Price restrictions.

In so far as goods which are sold under hire-purchase agreements are included within any of the control orders which have been made by the Ministry of Supply under regulation 55 of the Defence (General) Regulations the extent to which the price is fixed or controlled will necessarily depend on the terms of the Order.

But it must also be remembered that hire-purchase transactions are within the ambit of the Prices of Goods Act, 1939. The very wide definition given to the word "offer" in section 20 of that Act includes the publication of a price list and the notification of the price proposed for a sale of goods. Since, in cases to which

the Hire-Purchase Act, 1938, applies the cash price must be separately stated, it seems indisputable that hire-purchase agreements will fall within this section and that, therefore, in all cases to which the Order made under the Act (S. R. & O., 1940, No. 685) applies the hire-purchase company is restricted to the price charged on August 21, 1939 (the standard price), plus such additional matters as are justified by the Act (section 4) under the title of "permitted increase" (*h*). In a decision under the rather similar legislation of the four years' war it was decided that the material date for purposes of a prosecution was that of the contract : *R.* v. *Hammersmith Profiteering Committee* (1920), 89 L. J. K. B. 64; but it is thought that under the present Act the mere exposure or advertisement for sale is in itself an offence if the lawful price is exceeded (*i*).

If the Act is infringed the contract is illegal with the result, presumably, that neither side can sue the other upon it. The buyer is, however, given special rights if the offender is prosecuted to conviction (section 10).

BUILDING SOCIETIES AND THE DOCTRINE OF *ULTRA VIRES*.

The litigation which recently took place in connection with the loan by the Bradford Third Equitable Benefit Building Society to Mrs. Borders has excited widespread interest and has resulted in the passing of a new Act. It is doubtful whether practitioners as a body have had an opportunity of considering fully the points which were involved in this litigation, although it will have been appreciated that Mrs. Borders, described as a modern Portia, invoked the doctrine of *ultra vires*, and claimed against the building society damages for fraudulent misrepresentation as to the value of the house which she had purchased, and in connection with which purchase the Society had lent to her a sum of money.

Corporations and ultra vires.

Before considering the facts of the case it may be of assistance if we first consider the effect of an *ultra vires* dealing by a

(*h*) The matters which may be taken into account in calculating this increase are set out in Schedule I to the Act. They do not include any alteration in current interest rates.

(*i*) Though if followed by a contract the two together constitute one offence: Prices of Goods Act, 1939, s. 7 (1).

corporation. The leading decision on that subject is *Ashbury Railway Carriage, etc., Co.* v. *Riche*, L. R. 7 H. L. 653. It was there decided that where directors of a company purport to make a contract on behalf of the company and neither the directors nor the company have authority to make such contract then it is void and *cannot be enforced against* the company; and as it is void it cannot even be ratified by the company so as to make the company liable. But it has been made quite clear by a later decision that the *Ashbury Railway Carriage Case* is not an authority for the proposition that money lent by directors without authority cannot be recovered; and it is also plain that a borrower cannot refuse to repay the loan upon the ground that those who lent the money had no authority to do so: *Re Coltman* (1881), Ch. D. at p. 871.

Distinction between illegal and ultra vires *contracts.*

A contract which is merely *ultra vires* is entirely different from a contract the subject matter of which is illegal. Thus, if A enters into a contract with B under which A is to build for B, at a given price, a house of a particular construction and the building of a house of that kind is illegal, then the consideration for the payment of the money is the doing of an illegal act. The whole contract is thus tainted with illegality. Accordingly if A does build the house B can refuse to pay to A the agreed sum: *Stevens* v. *Gourley*, 7 C. B. (N.S.) 99; and see *Re Coltman*, *supra*. The result is unfortunate for A, but once the Courts have refused to enforce illegal contracts it would be illogical for them to afford a remedy to either of the parties on sympathetic grounds. But there is a clear distinction between acts which are illegal and those which are done without authority.

In the *Coltman Case* the claim was based on a promissory note payable by three persons who were jointly and severally liable upon it. One of the three makers of the note died and proof was sought against his estate. Fry, J., rejected the proof on the ground that the money advanced was money belonging to a friendly society, that the lenders were trustees of that society and that the Friendly Societies Act, 1874, made the lending of money on personal security to persons not members of the society an illegal act, with the result that proof could not be admitted. In the Court of Appeal, Jessel, M.R., and Brett and Lindley, L.JJ., decided that such a contract although unauthorised was not illegal. It was true that the Act stated that the trustees might, with certain consents, lend the money of the society on certain securities not including personal securities, but the Act did not prohibit lending on personal security.

It merely gave the trustees no authority to do so, and the making of such an advance would be a breach of trust. Jessel, M.R., was not satisfied that an express provision in the Act stating that the trustees should not lend money on personal securities would have made any difference. There would, in his opinion, have been no such illegality in the transaction as to preclude the trustees from recovering the money lent. He added: "How the persons who borrowed it, there being no illegality in the borrowing on their part, and no illegality in their agreeing to repay the money so borrowed, and no illegality in the purpose for which they were intending to apply it, can set up the doctrine that they are relieved from their liability by reason of the money having originally belonged to a friendly society, is a thing which I am quite unable to understand." Brett, L.J., observed in the course of his judgment that it did not seem to him that the borrower could set up as a defence the plea that the person who lent him the money, and to whom he had promised to repay it, had no authority to lend it to him. That, he said, was an objection which it was not for the borrower to take. The contract was—If you will lend me so much money I will pay you that money back on demand. The consideration was the loan: that was not illegal. The promise to repay was not illegal; the money was not borrowed for an illegal purpose to do an illegal or immoral thing and there could not be anything illegal in the contract. The only objection was that the lender had no authority "and that is an objection which he [the borrower] cannot take". Lindley, L.J., observed that the mere fact that the money was got from a place from which the trustees had no right to take it did not invalidate the promise to repay on demand.

We see then that if a borrower can establish that a loan was *ultra vires* the lender and security has been given for the loan, he may also be able to establish that the contract for the giving of the security, and accordingly the security itself, is void. The borrower may thus be able to obtain an order for the delivery up of the title deeds to the property which has been mortgaged or charged if the property is of a kind which the lenders are expressly forbidden to take by way of security. But, however this may be, where A has lent money to B it is not possible for B to refuse to repay the loan merely because A had no authority to make the loan. And if A has wrongly purported to have authority from X to lend X's money to B, then B, having promised to repay the money to X, cannot successfully defend proceedings by X for the return of the money upon the ground that A had, in fact, no authority from X to make the loan: cf. *Kelner* v. *Baxter*.

The Borders Case: the facts.

We turn now to the "Borders" litigation. The activities of Mrs. Borders commenced when the Bradford Third Equitable Benefit Building Society took proceedings against her under a mortgage alleged to have been executed by her in October, 1934, on a freehold house at West Wickham which she had purchased from certain builders named Morrells. It was alleged that she had failed to pay three months' subscriptions under the mortgage. Mrs. Borders had paid £730 for the house, having borrowed from the society on the security of the house a sum of £693.

The normal advance would have been £545, but on account of a pooling agreement with the vendors the advance was increased to £693, the society taking a collateral charge upon the sums deposited by the vendors with the society in accordance with the pooling arrangement. Mrs. Borders knew nothing of this arrangement and contended in the action:

(1) That she had not executed the mortgage sued upon, although she admitted that she had executed a mortgage in escrow subject to the making good of certain defects in the house, a note to that effect being endorsed by her husband on the mortgage which he and she had signed.

(2) That the collateral security on the pool rendered the mortgage illegal under the Building Societies Acts and the rules of the society and that it was accordingly unenforceable.

(3) That she was entitled to recover from the society damages for fraudulent misrepresentation. This claim she supported by referring to the contents of a brochure issued by the builders stating that the house would be built under the supervision of the local authority, would be thoroughly inspected by the society's surveyor during its erection, and would be of good materials.

Mr. Justice Bennett's decision.

Bennett, J., came to the conclusion on the evidence that the society had not proved that the tenant had executed the mortgage sued upon. The witness to the execution of the mortgage was a Mr. White, but execution of the deed by Mrs. Borders in the presence of Mr. White was not attempted to be proved by the evidence of Mr. White. The evidence tendered was that of a Mr. Feldmar, who swore that he saw Mr. and Mrs. Borders put their signatures to the mortgage deed and that the signatures purporting to be theirs at the foot of the deed were in fact theirs and were put there in his presence. On the other hand Mrs. Borders said (and was supported by an independent witness) that

upon the mortgage deed which Mrs. Borders and Mr. Borders (as guarantor) signed there was written in ink by Mr. Borders a note to the effect that the deed was not to come into operation until certain works had been executed at Mrs. Borders' house.

Before Mr. Justice Bennett Mrs. Borders was unsuccessful in her counterclaim for damages for fraudulent misrepresentation but, as will be seen, she succeeded on this issue later in the Court of Appeal.

Bennett, J., carefully considered the suggestion that the mortgage was *ultra vires* and, although he came to the clear conclusion that the rules had not been adhered to, he decided that a mere violation of those rules would not invalidate the transaction.

He referred to the case of *Sheffield, etc., Building Society* v. *Aizlewood* (1889), 44 Ch. D. 12, where a building society in liquidation claimed against the directors for losses in connection with a loan of £25,000 made on the security of a mortgage of a leasehold property together with a charge on certain interests in personal estate (by way of collateral security). The society was authorised to lend on the security of copyhold, freehold, or leasehold property, but had no authority to make a loan on the security of personalty, although the trustees might invest in the *purchase* of what may be termed "trustee investments" (under section 25 of the Building Societies Act, 1874). In that case Stirling, J., remarked that it was contended that the inclusion of personal interests in the security vitiated the whole transaction, and that if this were well founded then it would seem to follow that the inclusion in a building society's mortgage of a personal covenant by the mortgagor for repayment of the advance in reliance on the solvency of the mortgagor might easily vitiate a transaction in which those were elements; but he considered that the officers of the society might to a certain extent and for certain purposes rely on the solvency of the borrower. He thought, however, that if the circumstances of the borrower were such that the borrower's personal covenant was without value the building society might secure a like advantage by means of the personal guarantee of a third party or a charge on some readily available pure personal estate. The benefit, however, must be collateral and the validity or propriety of the transaction was to be tested as if no such ingredient entered into it. If there were no freehold, copyhold or leasehold estate comprised in the security, or if the estate so comprised were merely nominal, or its value out of all proportion to the amount advanced, the transaction was beyond the powers of the society and invalid, but where, as in the case

before him, the borrower offered as security such estate, *i.e.*, freehold, copyhold or leasehold estate to a substantial extent, an advance was within the powers conferred by the Act of 1874, and the question for the officers of the society to determine was the amount which might properly be advanced.

In what securities or investments may a building society invest its moneys? It is clear from section 13 (1) of the Building Societies Act, 1894, that a building society must not advance money on the security of any freehold, copyhold or leasehold estate which is subject to a prior mortgage unless the prior mortgage is in favour of the society, and under section 17 of the same Act the powers of investment under the Building Societies Act, 1874, s. 25, are to include the power to invest in or upon any securities in which trustees are for the time being authorised by law to invest. By section 13 of the Act of 1874 it is enacted that any number of persons may establish under that Act a society (either terminating or permanent) for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon the security of freehold, copyhold or leasehold estates by way of mortgage. So far as statutory authority is concerned there would therefore appear to be no justification for lending on the security of personalty, or of taking a collateral charge on personalty. Lindley, L.J., observed in *Cullerne* v. *London and Suburban, etc., Building Society* (1890), 25 Q. B. D. 485, that it appeared that building societies could only advance money on the security of landed property of freehold, copyhold or leasehold tenure, citing certain old Acts, adding that the Act of 1874 was to the same effect except that the public funds were added.

Returning now to the *Borders Case*, it was found that by rule 23 of the Bradford Third Equitable Benefit Building Society the proposed security was to be valued by the society's surveyor. Rule 24 contained certain provisions which appear to have limited the amount which the directors might advance out of the society's moneys to such an amount as they thought could be recovered out of the land taken as security without regard to any other security. Bennett, J., considered that if in fixing the advance the directors had regard to collateral security provided by a third party they would violate rule 24. He thought, on the facts as proved, that the directors would not have advanced £693 on Mrs. Borders' freehold property without collateral security, and that the minutes of their meeting showed that they would not have advanced more than £545 upon that security alone. This, however, only meant that there was an infringement of the rules, and a mere infringement of internal machinery (*e.g.*, rules) will not render a loan

ultra vires a corporation or other body if it is within the general powers of that corporation : see the *Ashbury Carriage Case* and *Grant* v. *U. K. Switchback Co.*, 40 Ch. D. 135 (which shows that such matters may be ratified).

On the authority of *Sheffield, etc., Society* v. *Aizlewood* (1889), 44 Ch. D. 12 (referred to above), Bennett, J., accordingly held that the transaction was not *ultra vires* the society. It is further to be noted that although Mrs. Borders claimed an injunction restraining the society from acting *ultra vires*, such a remedy could not have been granted at her instance, for it had been established on her own evidence that she had not executed the mortgage and therefore she could not be a member of the society. Such a remedy was open only to members of the society.

Halifax Building Society v. *Salisbury.*

Mrs. Borders did not, however, leave matters there, but appealed to the Court of Appeal. What happened in the Court of Appeal will be narrated later in this article, but meanwhile there came before the Court of Appeal another case in which it was necessary to consider the *ultra vires* doctrine and it is proposed to deal first with that case. The case in question was *Halifax Building Society* v. *Salisbury*, [1939] 4 All E. R. 427. The Halifax Building Society having made an advance on the security of a mortgage of a certain house which had been purchased by the defendant, claimed the sum of £40 odd being subscriptions and fines due under the mortgage. The borrower set up the plea that he was induced to enter into the mortgage by fraudulent misrepresentation, and he also claimed that the mortgage was void as being forbidden by section 13 of the Building Societies Act, 1874. The case came before the Court of Appeal following the decision of the County Court Judge in favour of the Society. Slesser, L.J., in the course of his judgment referred to section 13 of the Act of 1874 (*vide supra*), and said that in his opinion the terms of that section constituted a restrictive and limiting definition, and, on general principle, acts not falling within the purposes there stated or reasonably incidental thereto would be beyond the powers of the society and void. He pointed out that in *Sheffield, etc., Building Society* v. *Aizlewood*, *supra*, it was held that a building society could secure the amount due under a mortgage by means of a personal guarantee of a third party or by charge on readily available personal estate as an incidental power in connection with the making of advances to members on the security of immovable property. He also observed that if the mortgage were secured otherwise than on the security of freehold, copyhold or leasehold

estate it would not be valid. That observation was perhaps a little confusing; but it seems reasonably clear from the context that Slesser, L.J., meant that the real and essential security must be freehold, copyhold or leasehold property.

Here the advance amounted to 95 per cent. of the value of the house and land. Seventy-five per cent. was apparently the maximum which the society would advance without the further security consisting of the pooling agreement, and it may therefore be taken that in so far as the advance exceeded 75 per cent. of the value this excess was further secured by the pooling arrangement under which the builder vendors guaranteed the excess of the advance over the 75 per cent. in value and charged a pool (*i.e.*, a deposit fund) with the payment of the excess. As Slesser, L.J., pointed out, if the advance on the security of the house was not as stated, but was a mere colourable contention to enable the advance to be made on personal security there would have been a different position; but the mere absence of knowledge of the borrower of the additional security seemed immaterial. The County Court Judge found that the reason why the society did not disclose the collateral security was that the society's representative thought that it might make the borrower less punctual with his payments if he knew that the society had additional security; but the learned Lord Justice did not consider that the omission of a reference to the collateral security could amount to a false representation that the security offered was deficient or not worth the £475 which the borrower was paying. Actually it appears that in this case the society assessed the value of the property at £475, the amount of the purchase price, so that there is no such discrepancy here as in the *Borders Case*, although it seems clear that the society would not have advanced 95 per cent. of the purchase price without the collateral security under the pooling agreement. The borrower apparently observed that he was surprised to hear of the collateral security and "wondered why the society advanced so much on the property, and thought he had been caught". His suggestion appears to have been that he was under the impression that the society considered that the property constituted a satisfactory security by itself, for the loan. On the other hand he had already signed the contract for purchase when the loan was offered by the society and it does not seem that he could have refused to complete the purchase, although the house when finished does not appear to have been satisfactory, and no doubt some measure of relief in damages might have been, and would still be, available to him *as against the vendors*.

Luxmoore, J., dealing with the question of *ultra vires*, thought that help might be derived from *Att.-Gen.* v. *Great Eastern Ry.*

(1880), 5 App. Cas. 473, where Lord Selborne said that whatever might fairly be regarded as incidental to or consequential upon those things which the Legislature had authorised a corporation to do ought not unless expressly prohibited to be held to be *ultra vires*. He thought that in the absence of express authority to the contrary the taking of collateral security in support of a mortgage to a building society was not *ultra vires*, the essential question being whether there was merely a colourable advance on immovable property of nominal value. He pointed out that if the test to be adopted in order to determine whether the mortgage was *ultra vires* was whether the margin of value of the property over the amount advanced was small, it would follow that where collateral security was unnecessary the taking of collateral security would be *intra vires*, but where it was necessary owing to the smallness of the margin the mortgage would be *ultra vires* and the object of the Act (namely to enable poor persons to purchase houses) would be frustrated. It had been urged that the society were only prepared to lend £355 on the freehold property and that £98 was lent on the security of the guarantee. Luxmoore, J., could not follow this. He considered that the £98 was not secured solely or primarily on the guarantee or charge but was secured equally with the rest of the loan on the freehold. He referred to the *dictum* of Lindley, L.J,, in the *Cullerne Case* (cited above), and thought that that decision afforded no assistance to the case in hand.

The judgment of Atkinson, J., in the case now under consideration, throws light on the construction of the property. After mentioning that the defendant went into possession Atkinson, J., said : "He soon found out that metaphorically speaking he had suffered a fate somewhat similar to that of the man who travelled from Jerusalem to Jericho. The house was disgracefully built. The workmanship was bad : the materials were bad : the bylaws, in many respects, had been ignored." The County Court Judge had found that the cost of remedying the defects was nearer £110 than the £87 claimed; but all the Judges concluded that there was no fraudulent misrepresentation on the part of the Halifax Society, and the society therefore succeeded in its action.

Liability of society for untrue statements.

It will be noted that in the *Halifax Society Case* there was no evidence to show that statements of the building society had led the borrower to believe that the house was well built, or that such statements had caused him to purchase the property, to his

detriment. But Mrs. Borders had made that suggestion in her case, and although she did not succeed on this issue in the High Court, the Court of Appeal, as will be seen later, decided in her favour upon that point. This aspect of the Borders litigation is worthy of special note in spite of the Building Societies Act, 1939, to which brief allusion will be made later. However careful building societies may be in following the course laid down in that Act, it is clear that they cannot escape the consequences if they associate themselves with untrue statements made by builder vendors. The brochure issued by Morrells, the builder vendors, in the *Borders Case* stated that they were the only builders in Great Britain who could offer by special arrangement with a leading building society a 95 per cent. mortgage advance over a period of twenty-four years at 5 per cent. interest, adding that this proved without a shadow of doubt the amazing value of Morrells' houses. Having regard to the facts found by the Court, it was abundantly clear that these representations were untrue, and the question was whether the building society had "fathered" this brochure. In the course of the hearing before Bennett, J., certain letters which had passed between the builders and the society were produced. It appeared that the society had received a copy of the brochure and did not criticise the passage above mentioned. These letters were considered when the case came before the Court of Appeal, when Mrs. Borders, continuing her litigious efforts, appealed against the decision of Mr. Justice Bennett (*Borders* v. *Bradford, etc., Building Society*, [1940] 1 All E. R. 302). The Court of Appeal were of opinion that the society had made themselves parties to the fraudulent misrepresentations contained in the brochure, and accordingly Mrs. Borders' counterclaim succeeded. It was made clear that the facts before the Court were not inconsistent with the personal honesty of the directors.

Assessment of damages.

How were the damages to be assessed? The liability to which the defendant had subjected herself was increased by the amount of interest payable upon the sum borrowed, and the following method was adopted in order to assess the damages :

(1) Add to the advance of £693 interest at 5 per cent. per annum from the date of the advance up to date, giving credit for repayments made by the borrower to the society. This total is £X.

(2) Ascertain true value of house. This is £Y.

(3) Add to £Y – £34 (paid to the vendor) interest at 5 per cent.

per annum from the date of the advance up to date, giving credit for repayments. The result is £Z.

(4) The damages are £X – £Z.

General effect of 1939 Act.

The general effect of the Building Societies Act, 1939, has been explained in the last issue of this Magazine; but it seems to be desirable to point out here that section 1 of that Act provides that in determining the amount of any advance made before the commencement of the Act (August 4, 1939) on the security of freehold, copyhold or leasehold estate the society shall be deemed always to have had power to take into account, besides the value of that estate, the value of any additional security for the advance; but nothing is to deprive a party to any proceedings instituted before February 21, 1939, of any relief to which he would have been entitled but for the Act.

It is therefore unlikely that we shall have any further cases dealing with the neat question of the right of building societies or other bodies to take advantage of pooling agreements, although it is possible that the *Borders* or the *Salisbury Case* might find its way to the House of Lords.

Were the mortgage moneys irrecoverable?

From the remarks made at the beginning of this article, it will be seen that, in the event of an appeal, it is unlikely (if not impossible) that Mrs. Borders could succeed in the argument that the moneys secured by the mortgage were irrecoverable. Indeed that argument does not appear to have been seriously pressed before the Court of Appeal. Mrs. Borders had received the benefit of the advance. The contract for the loan (and the creation of the mortgage) was not illegal; it was not even *ultra vires*. It was not possible in the circumstances to treat the purchase and the contract of loan as rescinded, and the Court of Appeal awarded damages against the society on the footing that the purchase and the contract of loan were effective although induced by fraudulent misrepresentation.

It will have been noted that the Court did not consider that it was proved that the mortgage on which the society sued had been executed by Mrs. Borders. No doubt the conveyance to Mrs. Borders had been handed to the society by the vendor's solicitors, and possibly the society was entitled to retain it by way of security for the advance, *i.e.*, as equitable mortgagees by deposit. But this question is not free from doubt. The original

contract was for the creation of a legal mortgage to take effect on the completion of the purchase. Mrs. Borders, however, stipulated later that the mortgage to the society should not take effect until certain works had been carried out. It seems that these works were not executed, and that damages were awarded on the basis of the value of the property as it stood at the completion of the purchase. If this be so it is not altogether clear at what stage the society would be entitled to call for the completion of a legal mortgage in its favour, or at what stage the society could be regarded as holding the conveyance to Mrs. Borders as equitable mortgagee. It does not seem from the report that the society claimed a declaration that it was entitled to hold the conveyance to Mrs. Borders as security for the loan. It may well be that it was considered unwise to ask for such a declaration as Mrs. Borders had not claimed the delivery up of the conveyance, although she had (perhaps illogically) claimed in the Court of Appeal a declaration that the legal mortgage propounded by the society was of no effect. As it had been found, upon the evidence, that the legal mortgage had not been executed by Mrs. Borders, the Court could not declare a non-existent document void.

The Building Societies Act, 1939.

It may safely be assumed that solicitors acting for building societies have already made a close study of the provisions of the Building Societies Act, 1939, and that such societies as are still advancing money on the security of freehold and leasehold properties have established the necessary machinery under the new Act for the disclosure of pooling agreements and the rebuttal of any warranty to borrowers as to the value of the property on which an advance is made.

Duties of the vendor under the 1939 Act.

It is not so clear that builders who have entered into pooling agreements with such societies have appreciated the effect of section 8 of that Act. It is probable that the average builder who has made arrangements with a building society for advances beyond the normal lending limit on the security of a deposit of money with the building society coupled with a guarantee by the builder is under the impression :—

(1) That he may safely leave it to the building society to disclose the arrangement in cases where a loan is being made by the building society in connection with the purchase of any given property.

(2) That the contract will not be affected if he sells a house for cash and does not disclose the fact that he has arranged with the society to give additional security in the event of the society making an advance beyond the normal amount which the society would lend on the security of the house alone.

Now, it is quite true that the society will, in practice, where an excess advance is made, not only disclose the arrangement with the builder but will obtain the signature by the borrower of a duplicate of the notice as required by the rules made under the Act. The penalty for failure to do so would be very severe. Under section 7 of the Act the result would be that no moneys would be recoverable either by the society or by any other person in respect of the advance or of any security given therefor (*e.g.*, the mortgage given by the borrower and the guarantee given by the builder) whether by the member [*i.e.*, the borrower] or otherwise, nor would any rights be exercisable by virtue of any such security except by leave of the Court. (Under sub-section (2) of the section the Court is given a general discretion under which the transaction can be reopened and the Court can make such orders as it thinks fit.)

Whether the advance is made solely on the security of the house which is being purchased or additional security is being taken, and whether the amount of the loan is the amount which would normally be advanced on the security of the house alone or is in excess of that amount, it is fairly certain that the society will desire to negative the warranty which would otherwise arise under section 9 of the Act that the purchase price of the property is reasonable. That warranty can be negatived by service of notice on the prospective borrower in the form prescribed by the rules made under the Act. The form of notice states that in the event of the society making an advance to assist the borrower in the purchase of the property in question, the making of the advance will not imply any warranty by the society that the purchase price of the property is reasonable. In this case also the notice will be ineffective unless a duplicate is signed by the borrower and delivered by him to the person by whom or on whose behalf it was given, and in accordance with rule 2 such signature and delivery must take place "before the contract to which it relates was made".

The key to the phrase within quotation marks is to be found in sections 7 (1) and 9 (1) of the Act, which provide, in effect, that the notices to be served (a) where security for the advance to the borrower is taken from a third party, and (b) where the

warranty as to reasonableness of price is being negatived, must be given "before any contract requiring the member to repay the advance is entered into".

So far it is the society who must arrange for service of notices on the prospective borrower. But the vendor would be wrong in making the assumption above mentioned, namely, that he can safely leave the society to make all necessary disclosures to the borrower. Actually the effect of section 8 of the Act is to convert into an option for purchase any contract made between the vendor and the purchaser for the sale of any property in connection with which there is in force between a building society and the vendor an arrangement in pursuance of which in the event of the society making an advance in excess of the normal advance upon such a property additional security will be provided by any person in respect of the advance unless the purchaser is given notice of the arrangement *before contract*. The result just mentioned only follows if in the event of the advance being made it would be made "for the purpose of its being used in defraying the purchase price" of the property in question.

It is quite understandable, where an advance is in fact being made to a prospective purchaser by a building society in excess of the normal limit by reason of an arrangement for the giving of additional security by the vendor, that the vendor should be required to disclose the arrangement before contract. But it seems, at first sight, a little difficult to understand why it should be necessary to make such disclosure where there is such an arrangement:

(a) If the purchaser is finding the whole of the purchase price himself; or

(b) If the society is making only a normal loan and taking no additional security.

Nevertheless, it appears to be quite clear from the wording of section 8 that in both cases (a) and (b) the vendor must *before the contract for sale is made* serve on the purchaser a notice stating that the security taken by the society for any advance made by the society for the purpose of defraying the purchase price may include additional security provided in pursuance of such an arrangement between the society and the vendor as above mentioned. The view here expressed that in both cases (a) and (b) such a notice must be given is supported by the form prescribed by the Rules made under the Act. The form is as follows:—

"To [*name and address of prospective purchaser*].

"Whereas you are proposing to enter into a contract for the purchase of [*description and address of property*]

"And Whereas failing the receipt of this notice you will be entitled to rescind the contract and to recover any deposit paid in respect thereof

"Notice is hereby given that there is an arrangement in force with the —— Building Society under which additional security may be provided by [the vendor *or as the case may be*] in respect of an advance made by the society for the purchase of the said property if the society advances an amount in excess of that which it would consider proper to advance upon the security of the property alone."

It will be observed that there is no statement in this notice that the society is in fact proposing to make an advance on the security of the property in question, and the form is entirely suitable whether there is or is not any question of an advance by the society. It is thought that practitioners will do well to draw the attention of their builder clients to this section and the form of notice, in all cases where those clients are operating under or have made pooling arrangements under which additional security may be provided for excess advances. And it should be pointed out to the clients that it is absolutely essential that a duplicate of the notice should be signed *before* the contract for sale is made with the prospective purchaser. Moreover, under rule 2 the acknowledgment on the duplicate must be in the words "Received a notice of which the foregoing is a copy" and these words must be "appended to the duplicate, together with the signature of the recipient *and the date*".

Effect of failure to serve notices.

If the vendor omits to take these precautions the purchaser will be entitled to rescind the contract and to recover any deposit paid by him. As it is quite a common practice for builder vendors to permit purchasers after contract to enter into possession as tenants at will, it is presumed that the exercise of such a right might put the vendor to some expense as well as annoyance. If the purchaser exercised his right of rescission after he had been in possession for say six weeks the vendor would probably have to carry out various works of redecoration and to pay legal costs incurred in connection with the sale, quite apart from the loss resulting from the delay in finding another purchaser.

In many cases where arrangements for excess advances have been made by builders with a building society the result of the war has been to leave those arrangements in a state which may be described as "suspended animation" and not to cancel them.

Therefore, if the builders effect a sale for cash, or the purchaser is obtaining a loan from some other lender, the builder must disclose the arrangement under which the society, if making the advance, would have obtained additional security.

It is certainly not clear to the writer why it should be necessary to make this disclosure in cases where the purchaser is paying for his house in cash or financing the purchase by borrowing from another source; but the wording of the section appears clearly to require such disclosure. It is not very unusual for an intending purchaser who has paid a small deposit (say £10) and signed the builder's printed contract, to endeavour to withdraw from the bargain. Failure to obtain the purchaser's signature of the requisite duplicate notice will enable such a purchaser not only to withdraw, but also to recover his deposit.

ASSENTS AND TITLE TO LAND.

The reliance which the profession had been placing upon section 36 of the Administration of Estates Act, 1925, concerning the effect of written assents had been rudely shaken by *Re Duce and Boot's Contract*, [1937] Ch. 642. The decision of Farwell, J., in *Re Hodge*, [1940] Ch. 260, with regard to the necessity of a written assent will come as an almost equal shock. Between them these two cases may result in undermining the essential purpose of the section in keeping equities off the title.

The decision in *Re Hodge* (*supra*) was directed to a number of points, but for the purpose of this note the relevant facts may be shortly stated. A testatrix (who died in 1934) devised to her executor certain freehold property subject to certain onerous obligations. The executor was also sole residuary legatee and devisee. The executor proved the will and did certain acts of administration, including a sale of some part of the property, but he never executed any written assent to himself. He then desired to disclaim the specific devise in order to free himself from the obligations imposed thereby. It was argued that under section 36 (4) of the Administration of Estates Act he could disclaim because an assent to the legal estate shall be in writing and an assent not in writing or not in favour of a named person shall not be effectual to pass a legal estate. Farwell, J., said (at p. 264): "In my judgment this is not the true view. No doubt under the Act if a vendor is selling as beneficial owner taking under a will,

the purchaser is entitled to require a written assent in order that he may be satisfied as to the title, and the Act gives him the right to demand it, but in a case of this sort the position is not the same. The legal estate in the property is vested in the plaintiff as legal personal representative and there is therefore no difficulty with regard to that. His equitable interest as devisee depends upon equities and upon whether or not he has done acts which must be treated as amounting to sufficient evidence of assent so as to make it impossible for him now to say that he has never accepted this gift."

It should be noted at once that Mr. Justice Farwell's decision was directed primarily to the right of the executor to disclaim the devise. Nevertheless the substance of his judgment appears to rely upon the legal estate being already vested in the executor. A simple illustration may make the problem plainer. If X was executor and beneficiary under a will and had by his acts (see *Wise* v. *Whitburn*, [1924] 1 Ch. 460) assented in equity to the devise. X died intestate. X's administrator then proposes to sell the land. Can the purchaser insist upon a written assent? If he cannot, then the trusts of the original will together with the acts constituting an implied assent must come onto the title for all time. There is no devolution of representation in the case of an intestacy, and the administrator can only claim to make a good title by reason of the implied assent, the legal estate being already vested in the intestate.

The extract from the judgment of Farwell, J., cited above does not cover this contingency. His reference to the right of a purchaser to require a written assent from a vendor selling as a beneficial owner taking under a will contemplates the case where the beneficiary never has had the legal estate vested in him. It is improbable that an executor-beneficiary would ever seek to sell as beneficial owner, and a purchaser is protected by section 36 (8), although he knows that the administration has in fact come to an end. The case instanced, and there will be many such in small estates where the property is, for example, left absolutely to the spouse, undoubtedly presents a serious problem if the logical result of this decision is observed. Apart from this decision the view would be that as no assent was made by the deceased personal representative a grant *de bonis non* must be taken out and the administrator *de bonis non* would then assent to the vesting of the estate as directed by the personal representative of the deceased. From the point of view of the deceased executor-beneficiary there is no doubt that it would be a convenience to say that an assent had been made and so his title legal and equitable did vest in his

personal representative. From the angle of future purchasers of the title it would be an inconvenience of considerable magnitude.

If an executor-beneficiary can impliedly assent to his interest vesting in him, it is clear that a purchaser can only be protected by reliance on section 36 (7) of the Administration of Estates Act, 1925. If no notice of the assent appears on the probate a purchaser *from the personal representative* will be protected. If the property has devolved without any conveyance for value by the personal representative no protection is provided. In such a case, for example, where the interest has passed under the will of the deceased executor-beneficiary a purchaser will then have to investigate the equities and satisfy himself that a title can be made. This would be equally true of any conveyance by a person taking under an assent. If an executor can assent to the equitable interest vesting in himself he can assent to it vesting in another, who by acquiring the legal estate will then get a complete title. This would appear to bring every will on the title where the legal estate has become vested in the beneficiary, unless a conveyance for value was made by the personal representative, except that a statement in an assent that no previous assent, etc., had been made might protect a purchaser from the beneficiary taking under the assent: see Administration of Estates Act, s. 36 (6). In view of the doubt already thrown on this sub-section by *Re Duce and Boot's Contract* (*supra*), it is doubtful whether purchasers from such a beneficiary should feel very happy in accepting this protection. The position would merely revert to the difficulties illustrated by the decision in *Wise* v. *Whitburn* (*supra*). Unless the conveyance was made by a personal representative to a purchaser it is by no means clear that a title can satisfactorily be made without abstracting the will.

It is arguable, however, that this decision need not be carried to this extent. The learned Judge was concerned to decide whether the executor-beneficiary could disclaim the devise. The requirement of a written assent relates only to an assent to the *legal estate*. It may be submitted that the proper interpretation to be put upon the decision is that there can be in equity an assent to the beneficial interest in the devise without an assent capable of passing the legal estate and that the legal estate remained vested in the executor as such. If this construction is adopted it presents a novel feature. The legal estate remains vested in one capacity after the owner of the legal estate has acquired the sole beneficial interest. This is peculiar, but the Property Acts have produced results at least as surprising.

Nevertheless, although this last interpretation may be possible or even the most likely one to be adopted, no purchaser can be

advised to rely upon it. Unless he insists upon an abstract of the will he must take a title from the personal representative and ensure that no notice of any assent appears upon the probate. Should this link on the title appear further back than the immediate conveyance to the purchaser, he must insist equally upon inspecting the will or the probate as the case may be.

H. P.

SEVERANCE OF JOINT TENANCIES.

By MALCOLM M. LEWIS, M.A., LL.B., Barrister-at-Law.

One of the objects of the Law of Property Act, 1925, was to prevent the possibility of tenancies in common existing as legal estates. Accordingly, with a view to precluding the severance of a legal joint tenancy, section 36 (1) of the Act provides that where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale, in like manner as if the persons beneficially entitled were tenants in common but not so as to sever their joint tenancy in equity, while under sub-section (2) of the same section no severance of a joint tenancy of a legal estate so as to create a tenancy in common in land is permissible. But, of course, behind the trust for sale the equitable joint tenancy can be severed and section 36 (2) enacts, in effect, that such a severance may be effected by one joint tenant giving to the others a notice in writing of his desire to sever, or doing such other acts or things as would in the case of personal estate have been effectual to sever the tenancy in equity. This provision in fact increases the possible ways of severing an equitable joint tenancy in the proceeds of sale of land. Prior to 1926 a legal joint tenancy in land was, in equity, severed *ab initio* (1) if land were purchased by two or more persons who furnished the purchase-money in unequal shares; (2) if land were purchased by partners out of money forming part of the assets of their partnership; or (3) if land were mortgaged to two or more persons, whether they advanced the mortgage money in equal or unequal shares provided that the money did not belong to them on a joint account. Moreover, even though there may have been originally a joint tenancy of land both in law or in equity such a joint tenancy could subsequently be severed by one joint tenant assigning or mortgaging his share to a stranger, in which case the alienee became a tenant in common with the other

tenant or tenants. A severance also resulted from the bankruptcy of a joint tenant since his share vested in his trustee in bankruptcy.

Moreover, a mere agreement by a joint tenant to sell his share or a covenant in a marriage settlement to settle a share effected a severance in equity if not in law (*a*). Where, however, one of two joint tenants in fee simple granted a lease for years of his share, it appears that no severance resulted (Co. Littleton 185a); but if the original joint tenancy was for a term of years a lease by one joint tenant for a term less than the residue severed the joint tenancy (*b*).

Further, according to Coke on Littleton if A and B were joint tenants in fee simple and A granted his interest to C for life, and B became tenants in common, but the joint tenancy was suspended : if C died during the joint lives of A and B, the joint tenancy revived : if on the other hand A or B died during C's lifetime there was no right of survivorship and the tenancy was permanently severed.

A joint tenancy in real estate might also be severed if one of the joint tenants acquired an interest greater in quantum than that held by his co-tenants, as, for example, where there were joint tenants for life and one of them acquired the entirety of the reversion, or where there was a tenancy for life with remainder to joint tenants in fee simple and the tenant for life granted (but not surrendered) his life interest to one of the joint tenants (*c*).

But a severance could not formerly be effected by a mere statement of intention to sever (*d*); nor, where there were joint tenants of land, did the mere fact that they employed the land for the purpose of a business of which they were parties operate to sever the joint tenancy (*e*).

In the case of a joint tenancy of personalty, on the other hand, the modes of severance appear to have been more numerous. The *locus classicus* on this subject appears to be the judgment of Page Wood, V.-C., in *Williams* v. *Hensman* (*f*), where, in discussing the severance of a joint tenancy in certain funds, he said : " A joint tenancy may be severed in three ways; in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. . . . Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund—losing, of course, at the same time, his own right

(*a*) Co. Litt. 192a.
(*b*) Co. Litt. 188a; 1916; 193a.
(*c*) Co. Litt. 182b; 183a.
(*d*) *Patricks* v. *Poralet* (1740), 2 Atk. 54.
(*e*) *Brown* v. *Oakshot* (1857), 24 Beav. 254.
(*f*) (1861), 1 John. & H. 546, at pp. 557 *et seq.*

of survivorship. Secondly, a joint tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested. You must find, in this class of cases, a course of dealing by which the shares of all the parties to the contest have been effected as happened in the cases of *Wilson* v. *Bell* and *Jackson* v. *Jackson*."

As an example of the second mode of severance stated by Page Wood, V.-C., may be mentioned an agreement by joint tenants to dispose of the property by their respective wills followed by the making of wills. Thus, in *Re Wilford's Estate* (*g*), two sisters were entitled to certain leasehold property as joint tenants. They agreed to and did make mutual wills under which the survivor was to take the property for life only, and after her decease it was to be held for the benefit of certain nieces of each of them. One sister died and the survivor made a new will giving the property in a different manner. Hall, V.-C., held that the agreement between the joint tenants, acted upon by both in the making of their wills, effected a severance of the joint tenancy and that the property must be administered on the footing that the transactions of the sisters created a tenancy in common. This decision was followed by Sir Samuel Evans in *In the Estate of Heys* (*h*).

An example of the third method of severance stated by Page Wood, V.-C., is afforded by the case of *Jackson* v. *Jackson* (*i*), mentioned in his judgment. There a testator left the residue of his estate subject to certain prior interests to his sons as joint tenants (as the Court held). The sons used the funds for upwards of twelve years for the purpose of their partnership business and dealt with the profits as partnership property, and it was held that the course of dealing for so many years ought to be taken as evidence that they meant to sever the joint tenancy as well in the capital as the profits.

The effect then of section 36 of the Law of Property Act is to admit as modes of severing an equitable joint tenancy not only the modes which were previously applicable to a joint tenancy in land but also those additional modes stated in *Williams* v. *Hensman* (*supra*) as applicable to a joint tenancy in personalty. Moreover the

(*g*) (1879), 11 Ch. D. 267.
(*h*) [1914] P. 192.
(*i*) (1804), 9 Ves. 591.

section also provides an additional mode in that a notice in writing served by one joint tenant on the other or others operates to sever the equitable joint tenancy between him and the other or others. But it should be emphasised that it is still the law that a severance cannot be effected by will except in the case of mutual wills as in *Re Wilford's Estate* (*supra*).

The fact that an equitable joint tenancy is now so easily severable raises questions as to the position of a purchaser who is offered a title by the survivor of two or more persons to whom property was originally conveyed as joint tenants. The Law of Property (Amendment) Act, 1926, added to section 36 (2) of the Law of Property Act, 1925, the following provision: "Nothing in this Act affects the right of a survivor of joint tenants who is solely and beneficially interested to deal with his legal estate as if it were not held on trust for sale." It has been suggested in some quarters (*k*) that if a surviving joint tenant produces the conveyance to himself and his co-tenant together with proof of the death of the co-tenant, it is unnecessary to prove that the beneficial joint tenancy was not severed during the lives of the joint tenants because a purchaser without notice of the severance will not be affected thereby, and can rely on section 199 of the Law of Property Act, 1925. It is, however, submitted that this view cannot be upheld and that the true position is set out in *Emmet's Notes on Perusing Title* (*l*), where it is said "in view of the words 'who is solely and beneficially interested' the survivor should satisfy the purchaser that he or she was so absolutely entitled. A statutory declaration would be a suitable way of proving this." The reason why this latter statement of the law appears to be correct is that section 36 creates a statutory trust for sale in all cases of beneficial joint tenancy (other than settled land) and by section 27 of the same Act a purchaser is not safe in paying the purchase price to less than two trustees while such a trust for sale exists. If a sole surviving trustee offers title on the ground that he is solely and beneficially entitled he does so because he alleges that the statutory trust for sale has been terminated, and it is submitted that the onus is on him to satisfy the purchaser on this point. The purchaser has notice that the property has been subject to the statutory trusts for sale and he must satisfy himself that in spite of the fact he can take title from the vendor alone. If this is so then it is submitted that section 199 does not protect the purchaser who fails to make inquiries as to whether the vendor

(*k*) Encyclopædia of Forms and Precedents (2nd ed.), Cumulative Supplement, No. 12, p. 1428; Gibson's Conveyancing (15th ed.), p. 10.
(*l*) P. 393.

is in fact "solely and beneficially entitled", because having notice of the statutory trusts he must discover whether the statutory exception to the rule that the purchase-money must be paid to two trustees applies. It is accordingly suggested that in every case where a purchaser is taking title from a surviving joint tenant he should require the vendor to furnish a statutory declaration to the effect that prior to the death of the deceased joint tenant no such agreement was made between him and the vendor and no such notice or alienation was given or effected by either of them as to sever their beneficial joint tenancy. The form of precedent set out in *Key and Elphinstone's Precedents in Conveyancing* (*m*) for a conveyance by a surviving joint tenant suggests that this is also the view of the learned editor.

REQUISITES FOR TRANSFERENCE AS *DONATIO MORTIS CAUSA*.

By W. H. D. WINDER, M.A., LL.M., of Lincoln's Inn, Barrister-at-Law.

"Improvements in the law, or some things which have been considered improvements, have been lately proposed; and if, among those things called improvements, this *donatio mortis causa* was struck out of our law altogether, it would be quite as well; but that not being so, we must examine into the subject of it" (*a*). The obscurity surrounding this peculiar form of gift must have tempted many to agree with this opinion of Lord Eldon. Undoubtedly any examination into the essentials of a *donatio mortis causa* reveals anomalies and uncertainties. The contrast between the formalities required for even a trifling legacy and the sufficiency of the interested party's own oral evidence to establish a large gift *mortis causa* has always occasioned surprise. Against the privilege of this informal transfer can be set the difficulty of determining the conditions of its validity.

In a recent case Bennett, J., declared that "it seemed difficult to ascertain whether there was any clear principle on which the Courts had acted in deciding whether a document was or was not the subject of a *donatio mortis causa*" (*b*). It has come to be accepted that *donationes mortis causa* are not confined to choses

(*m*) 13th ed., p. 675.
(*a*) *Duffield* v. *Elwes* (1827), 1 Bligh (N.S.) 497, 533.
(*b*) *Darlow* v. *Sparks*, 54 T. L. R. 627; [1938] 2 All E. R. 235.

in possession; choses in action may also pass in this way. Delivery either of a chattel or of a document relating to title of a thing in action is the most usual method of establishing the gift.

Delivery and Choses in Possession.

It can be stated broadly that delivery has the same meaning whether a chose in possession or indicia of title (*c*) of a thing in action is in issue. The decisions proceed on the assumption that the requisites for delivery are the same in both cases. They may, therefore, to this extent be considered together. For example, there are decisions to the effect that in certain circumstances delivery of the key of a box amounts to delivery of its contents: if it contains a watch and a cheque both have been delivered. There has been a good *donatio mortis causa* of the watch, but the validity of the gift of the sum for which the cheque is drawn depends on additional considerations: only the preliminary requirement, that of delivery of the cheque, has been satisfied by handing over the key.

A *donatio mortis causa* of a chose in possession has been constantly said to depend on delivery of possession. There is no authority against the view that this is the only method of effecting it. *Inter vivos* a gift of a chattel may be made by deed, but it has never been held that a deed is sufficient *mortis causa*. On the other hand, in *Tate* v. *Hilbert* (*d*) Lord Loughborough, L.C., after saying that it was not necessary to discuss whether delivery was necessary in all cases, added that "perhaps it might not be difficult to conceive that it might be by deed or writing. It is clear, it could not be by mere parol". If a *donatio* by deed were valid, equity would treat the donee as a trustee for the donor in the event of the latter's recovery from the illness in respect of which the gift was made, just as it treats the donee of a thing in action who takes title (*e*) in similar circumstances. A *donatio* by transfer of title without delivery is justified in the case of things in action, as there are things in action, such as shares in a company, which cannot pass by delivery of indicia of title. Chattels are always capable of delivery even though the only practicable manner of delivery may be by handing over the key of the place in which they remain. *Donationes mortis causa* could be made by writing in Roman law, but although equity derives its principles on this subject from the *Corpus Juris* it has never been argued

(*c*) A convenient phrase first used by Buckley, J., in *Re Beaumont*, [1902] 1 Ch. 889, 894—895.

(*d*) (1793), 2 Ves. 111, 120.

(*e*) *Staniland* v. *Willott* (1852), 3 Mac. & G. 664.

that there can be a valid *donatio* of a chattel by writing. Thus, in the leading case of *Ward* v. *Turner* (*f*) Lord Hardwicke said that the civil law required delivery of certain gifts though others could be made by writing, but that the law of England "required delivery throughout": "tradition or delivery is necessary to make a good donation *mortis causa*". A *donatio* of a thing in action cannot be made by mere writing (*g*), and the same rule should apply *a fortiori* to choses in possession. And Lord Hardwicke has held that "a parol gift, without some act of delivery" is ineffective, that "such an act was necessary to establish a *donatio mortis causa*" (*h*).

Meaning of delivery.

"It is agreed on all hands that a *donatio mortis causa* cannot exist without a delivery" (*i*). This has been insisted upon from the beginning with respect both to chattels and indicia of title of things in action. Jekyll, M.R., explained that a *donatio mortis causa* differs from a legacy "which depends solely on the disposing words; but in a *donatio mortis causa* there must be a delivery, which is something more" (*k*). For this reason, in *Miller* v. *Miller* (*l*) he disallowed a claim to a coach and horses as "there was no delivery in the testator's lifetime": this was despite the fact that the deceased had purported to give the claimant the chattels by word of mouth, bidding three witnesses then present to take notice of the gift. There can be no *donatio* if the intended donee refuses to accept delivery which the donor attempts to make, even though he claims the gift after the latter's death (*m*).

An intention to make a gift is insufficient although something is done towards effecting it by delivery if the acts done fall short of delivery. In *Hardy* v. *Baker* (*n*) the deceased told her servant that she had put in a certain drawer a purse containing fifty guineas which she desired her servant to take and give to the claimant when she was dead. Lord Hardwicke held that the intended gift could not take effect *mortis causa* "because there was no delivery in the lifetime of the testatrix". In *Bryson* v. *Brownrigg* (*o*), by the direction of the deceased, his wife, for the purpose of benefiting his daughter, took two securities out of a

(*f*) (1752), 2 Ves. Sen. 431, 442. Cf. Abbott, C.J., in *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551, 553.
(*g*) *Infra*, p. 404.
(*h*) *Smith* v. *Smith* (1733), 2 Str. 955.
(*i*) *Per* Gibbs, C.J., *Bunn* v. *Markham* (1816), 7 Taunt. 224, 231.
(*k*) *Ashton* v. *Dawson* (1725), Cas. t. King. 14, 15.
(*l*) (1735), 3 P. Wms. 356, 358.
(*m*) *Cant* v. *Gregory*, 10 T. L. R. 584, C. A.
(*n*) (1738), West t. H. 519.
(*o*) (1803), 9 Ves. 1.

drawer and placed them by themselves in another drawer of the same bureau. The wife always kept the key of the bureau, but it does not appear whether the deceased specifically gave her the key and the fact of the key being held by her is not mentioned in the judgment. In holding that there was no *donatio*, Grant, M.R., said that "shifting it from one drawer to the other" could not be called delivery: "It remains just where it was; except that it is in a different drawer, and separated from other papers" (*p*).

Possession may be still retained by the deceased though he makes elaborate arrangements with regard to the objects and their destination after his death. In *Bunn* v. *Markham* (*q*) the deceased caused bonds and money to be brought out of a chest and laid on his bed; he then caused them to be sealed up in three parcels and the amount of the contents to be written on each with the words, "For Mr. and Miss C.", the claimants; X was then instructed to replace them in the chest, lock it, seal up the keys which were directed "to be delivered up to Y" (his solicitor) and one of his executors after his death, and replace the keys in a basket of keys which was always kept in the deceased's bedroom. He afterwards spoke of the parcels as given to the claimants but he kept control of the keys until his death six months later. The gift was held to fail for want of delivery; the deceased "never divested himself of the possession for a moment" (*r*).

There is no objection to the donee's obtaining possession by his own act when he is thus instructed by the donor: the latter need not pass the objects with his own hands. In *Re Weston* (*s*) the donor asked the donee to go and get certain documents from a locked drawer of which he gave her the key and told her to keep them; she carried out his request. There was held to be a good *donatio* of the documents. It is on principle necessary when the donee acts on the donor's instructions or request made in his lifetime that the donee should obtain possession also in the donor's lifetime. The actual decision in *Spratley* v. *Wilson* (*t*) conflicts with this principle but it is very doubtful if it would be followed in view of Gibbs, C.J.'s subsequent criticism (*u*) of his judgment in that case. The deceased told the claimant that he had left a watch at Mr. R.'s at Charing Cross: "Fetch it away, and I will make you a present of it." The claimant obtained possession of

(*p*) *Ibid.* 5.
(*q*) (1816), 7 Taunt. 224.
(*r*) *Per* Dallas, J., *ibid.* 232.
(*s*) [1902] 1 Ch. 680.
(*t*) (1815), Holt N. P. 10.
(*u*) *Bunn* v. *Markham* (1816), 7 Taunt. 224, 227.

it after the death of the deceased by acting on these instructions. The latter's executor brought an action in trover for the watch. In directing a verdict for the plaintiff, Gibbs, C.J., relied on a passage in *Brooke's Abridgement*: "If A give a thing to B which is at York, and a stranger take it, B may maintain trespass for it" (*x*). However, in *Bunn* v. *Markham* (*y*), a year later, Gibbs, C.J., desired counsel not to consider his former ruling as "immediately after that trial he perceived that what he had somewhat improvidently thrown out, could not be maintained, because a delivery was wanting, and he had accordingly written a remark to that effect at the end of his own note of the case".

By the donee being put in possession by delivery is meant that he must obtain possession *stricto sensu*, sometimes called legal possession or possession in law. What has been variously called *de facto* possession, detention and custody will not support the gift. Thus, in *Hawkins* v. *Blewitt* (*z*) there was no *donatio* for the box in question was "left in the defendant's care for safe custody, and was so considered by herself" (*a*). The deceased ordered a box to be carried to the house of the defendant to be delivered to her, but made no other statement regarding it. Kenyon, C.J., said: "In the case of a *donatio mortis causa*, possession must be immediately given. That has been done here; a delivery has taken place; but it is also necessary that by parting with the possession, the deceased should also part with the dominion over it. That has not been done here" (*a*). This is the first of the many occasions on which the somewhat puzzling term "dominion" is used with reference to delivery by way of *donatio mortis causa*. For example, in *Cant* v. *Gregory* (*b*) Esher, M.R., said that "the delivery in a *donatio mortis causa* must be such a delivery as to pass the thing out of the dominion of the dying person and put it into the dominion of the person to whom it was given". In *Hawkins* v. *Blewitt* dominion is used in the sense of legal possession and contrasted with possession in the sense of custody or *de facto* possession. The necessity for adding yet another word to the confusing terminology of possession has never been explained; in the instant case the defendant had no possession (legal possession)

(*x*) But it was argued for the defendant that although trespass may be maintained upon a specialty against a wrongdoer, the case in Brooke does not say that the original owner or those who represent him might not reclaim by action of trover.

(*y*) *Op. cit.* 227. Gibbs, C.J., had granted leave to move on the legal point in the previous case but there is no report of any subsequent proceedings.

(*z*) (1798), 2 Esp. 662.

(*a*) *Ibid.* 664.

(*b*) 10 T. L. R. 584, 585, C. A. Cf. Stirling, J., in *Treasury Solicitor* v. *Lewis*, [1900] 2 Ch. 812, 817.

at common law, but only custody or detention, according to the more usual opinion, being a gratuitous bailee at will (*c*). But the word dominion would, nevertheless, be a convenient one if a *donatio mortis causa* is always revocable at will, for if it is so revocable, then, on a strict common law view, the donee is a bailee at will until the death of the donor, and therefore, according to the more usual opinion, has not legal possession. On the other hand, he has a peculiar kind of possession which is more than custody. There is no reported case in which the donor revoked the gift before recovering from his illness, but the revocability of a *donatio*, in this respect like a legacy, is said to be the rule (*d*). It may thus be convenient to have the special term dominion to describe the possession which will ripen into ownership by the death of the donor unless he previously revokes the gift.

Re-delivery to the donor.

A re-delivery to the donor merely for the purpose of safe custody does not prevent the original delivery to the donee from having full effect; the gift will still be good. In *Re Hawkins* (*e*) the donor, at the request of the donee, allowed her to put the banknotes, which had been delivered, in his deed box for safety against fire; the box was then replaced under his bed and the key replaced on a nail opposite his bed. Referring to a *dictum* of Gibbs, C.J., in *Bunn* v. *Markham* (*f*) that "all the cases agree that, if the donor resumes the possession it ends the gift", Lawrence, J., held that it had no application to the facts: "The word 'possession', when used in that case and in the other cases on this subject, means possession coupled with dominion and does not cover the possession of a mere custodian for the donee" (*g*). He said that it was plain that the donee in acting as she did had no intention of parting with the dominion which she had acquired and that the donor had no intention of resuming dominion. Lawrence, J., also mentioned two other facts, namely, that the re-delivery was made at the donee's request and that the subject-matter of the gift remained severed from the other contents of the

(*c*) *Lotan* v. *Cross* (1810), 2 Camp. 464.

(*d*) *Per* Lord Cowper, L.C., in *Jones* v. *Selby* (1710), Prec. Ch. 300, 303. Cf. Warrington, J., in *Hudson* v. *Spencer*, [1910] 2 Ch. 285, 290. In Williams on Executors, 12th ed., 486, it is implied that revocation can only be effected by recovery from the illness or resumption of possession. The question whether it can be revoked in any other way has not received attention; nor has the question whether, if resumption of possession is necessary, the donor can insist on this. A *donatio mortis causa* was revocable in Roman law: Inst. II, 7, 1. Cf. Swanston's note to *Walter* v. *Hodge* (1818), 2 Swans. 92, n. 2, p. 102, citing D. 39, 6, 16.

(*e*) [1924] 2 Ch. 47; following a *dictum* of Sargant, J., in *Re Wasserberg*, [1915] 1 Ch. 195, 202.

(*f*) 7 Taunt. 224, 231.

(*g*) *Re Hawkins*, *op. cit.* 51.

box belonging to the donor by reason of the gift's being inclosed in a separate, indorsed, envelope. But it would seem that the decision ought to be the same without these two additional factors. It would be insufficient for the donor to undertake the safe custody of the gift without there having been any initial delivery to the donee.

The case of *Re Taylor* (*h*) is a stronger one in favour of the donee than *Re Hawkins* (*e*), for there the donor obtained only partial custody by the re-delivery. A deposit-note was placed for safe custody in the donor's cashbox in his bedroom but the donee kept the key of the box to which she had access for household purposes. Stirling, J., held that this did not amount to a "resumption of possession". There was not even a resumption of complete *de facto* possession as the donee retained control over the contents of the box.

Antecedent and subsequent delivery.

The delivery need not be at the same time as the operative words of gift; it may be made before (*i*) or after (*k*). In *Cain* v. *Moon* (*i*) a deposit-note had been delivered to the donee for the purpose of safe custody: "the defendant had been in possession of the note as bailee of it for her daughter, with a liability to return it when called upon" (*l*). Later, when it was still held by the donee, the donor purported to make a *donatio mortis causa* of the note. In upholding the gift Lord Russell of Killowen, L.C.J., said that though delivery had been "made *alio intuitu*", "there is no reason why an antecedent delivery should not be effective" (*m*). Wills, J., took the same view, declaring that the necessity for delivery was the same as in the case of a gift *inter vivos*: "there are many requisites to an effective *donatio mortis causa* which are not necessary in the case of a gift *inter vivos*; but the necessity for delivery is the same, and there is no reason why in that respect the rule should be different. I think, therefore, that the antecedent delivery of the note to the defendant to hold it in a different capacity, the capacity in which she held it being changed by what took place subsequently when the *donatio mortis causa* was effected, was a sufficient delivery to satisfy the rule requiring delivery in gifts of chattels" (*n*). But the claimant has not a possession sufficient to found a *donatio mortis causa* by

(*h*) 56 L. J. Ch. 597.
(*i*) *Cain* v. *Moon*, [1896] 2 Q. B. 283, Div. Ct.
(*k*) *Re Weston*, [1902] 1 Ch. 680.
(*l*) *Per* Wills, J., [1896] 2 Q. B. 283, 288.
(*m*) *Ibid.*
(*n*) *Ibid.* 289.

words of gift merely because he is the servant of the deceased living with him in the house which contains the subject of the alleged gift (*o*); nor if the servant is a housekeeper living alone in the house as caretaker (*p*). A servant may be expressly constituted a bailee of specific property and if he has been so constituted the principle of *Cain* v. *Moon* would apply.

On the strength of *Cain* v. *Moon* Byrne, J., in *Re Weston* (*q*) declared that it was "not essential that the *traditio* should be at the actual moment of the gift" and upheld a *donatio* in which transfer of possession was somewhat later than the words of gift. The donor asked the donee to go and get certain documents which were in a locked drawer, gave her the key of the drawer, and told her to keep them; possession was obtained by carrying out the donor's request. It was not necessary for Byrne, J., in view of the fact that he held subsequent delivery to be sufficient, to refer to the question whether the delivery of the key was constructive delivery of the documents.

Delivery of key.

There may be constructive delivery of the property given by delivery of the key of the receptacle which contains it (*r*). A key is not a mere symbol, which would be insufficient, as Lord Hardwicke explains (*s*), and he quotes with approval the decision in *Ryall* v. *Rowles* (*t*) which allowed delivery of "bulky goods" in a warehouse in this way, it being said that it is the only delivery of which they are capable (*u*). But the rule is not limited to bulky goods of which manual delivery is not possible. In *Re Mustapha* (*x*) counsel argued that the rule was so limited, in reply to the specific question of Mathews, J., whether constructive delivery was confined to bulky goods; but it was held that bonds in a small safe passed by delivery of the key. The same case also decided that the delivery of the key may itself be a constructive delivery. The key of the safe was kept in a locked wardrobe the

(*o*) *Ward* v. *Turner* (1752), 2 Ves Sen. 431.
(*p*) *Trimmer* v. *Danby*, 25 L. J. Ch. 424. The servant in this case was not constituted a bailee of the documents claimed by being handed the key of the box which contained them.
(*q*) [1902] 1 Ch. 680, 684.
(*r*) *Jones* v. *Selby* (1710), Prec. Ch. 300 (small objects in a trunk); the decision of Jekyll, M.R., was reversed on appeal but on different grounds, and was approved by Lord Hardwicke on this point in *Ward* v. *Turner* (1752), 2 Ves. Sen. 431, 443; *Smith* v. *Smith* (1733), 2 Str. 955 (furniture in a room); *Re Mustapha*, 8 T. L. R. 160 (bonds in a safe).
(*s*) *Ward* v. *Turner*, *loc. cit.*
(*t*) (1750), 1 Ves Sen. 348, 362.
(*u*) Cf. Sargant, J., in *Re Wasserberg*, [1915] 1 Ch. 195, 202.
(*x*) 8 T. L. R. 160.

key of which was delivered to the donee; this was held to amount to delivery of the contents of the safe.

There must be an intention that the recipient of the key should thereby acquire possession. In *Trimmer* v. *Danby* (*y*) the claimant of bonds kept in a box had custody of it as being the deceased's housekeeper residing as caretaker in a house which the deceased did not live in at the time of his death; at some time he had handed her the key of the box. There was held to be no *donatio* of the bonds although there was an indorsement on their wrapper which suggested that the claimant was intended to enjoy them after the deceased's death. Kindersley, V.-C., held that there was "no ground for suggesting that the bonds were ever put into her possession, except so far as her having the key"; "she accepted the custody of the box and the key, not in the character of beneficial owner of the property, but she undertook in fact, the charge and custody of the key" (*z*). In *Wildish* v. *Fowler* (*a*) a gift failed in somewhat similar circumstances. The deceased, who lived in the claimant's house, handed her a packet which she placed in a bookcase of which the deceased had previously handed her the key; she locked the bookcase and retained the key. It was held in the Court of first instance that there had been sufficient delivery but the decision was reversed on the ground that there was no intention to transfer possession but only to place the packet in safe custody. The deceased's words, "Take care of it", were not permitted to be qualified by expressions in a letter in the parcel, which letter the claimant did not read or see until after the deceased's death.

If the donor in delivering the key intends that the donee should also assume possession of the receptacle there is no doubt that a *donatio* can be made even though the donee does not in fact assume complete control of the receptacle. This was the position in *Re Veal* (*b*), where the donee was handed the key of a box, the donor saying that she expected the donee to take possession of it and remove it from the bedroom which they both shared; the donee placed the box in a cupboard in the bedroom and never removed it during the donor's life. The contents of the box were held to pass as *donatio mortis causa*.

It has been pointed out (*c*) that in the cases in which delivery

(*y*) 25 L. J. Ch. 424.
(*z*) *Ibid.* 426.
(*a*) 5 T. L. R. 113; 6 T. L. R. 422, C. A.; 8 T. L. R. 457, H. L.
(*b*) 29 L. J. Ch. 321; not reported on this point 27 Beav. 303, *sub nom. Veal* v. *Veal*.
(*c*) By Rowlatt, J., *Wrightson* v. *McArthur & Hutchisons (1919), Ltd.*, [1921] 2 K. B. 807, 817.

of the key of a box has been held to confer possession of the contents both parties were living in the same house which contained the box, and that therefore the person receiving the key could not be expected to take away the box from the donor's house, but could hold possession of it in the house. Rowlatt, J., said that it had never been held, so far as he knew, that delivery of the key of a box which the deliveror retains in his own house, where the other party does not live, passes the possession of the contents. But this fact of living in the same house is not mentioned in the judgments of the cases on gifts *mortis causa* and it may be assumed to be not part of the *ratio decidendi*. The cases proceed on the ground that the key is the effective means of possessing the contents: the fact that the donor still retains a measure of control over the box because it is in his house, and, indeed, over its contents, by his power to smash it open, has been ignored. However, the decision of Rowlatt, J., would almost certainly be held to resolve these doubts should they ever be raised in connection with a *donatio mortis causa*. He held, where the existence of a pledge was in issue, that possession of goods in a warehouse passed to the transferee of the key although the transferor remained in possession of the warehouse of which the transferee was not even a partial occupier. It is true that in this case the goods were bulky, unlike the contents of a box, and could not, therefore, be immediately removed. But the restriction of the rule of delivery by key to this class of goods was rejected in *Re Mustapha*, as described above (*d*). Further, there is the more recent and unqualified *dictum* of Farwell, J., to the effect that "it is not necessary to hand over the box if the key is handed over because it is assumed that the key which unlocks the box being in the possession of the donee the donor cannot have access to the contents so as to deal with them in any way" (*e*).

Retention of key.

There will, it appears, be no *donatio mortis causa* if the receptacle is delivered but the key retained by the deceased (*f*). It was held in *Re Johnson* (*g*) that the deceased who had retained the key had not parted with her dominion over the property contained in the box. In a short judgment Farwell, J., said that "she did not intend to part with her dominion", apparently implying that if, on the facts, she had so intended, the result would not necessarily have been the same. If the intention of

(*d*) P. 389.
(*e*) *Re Craven's Estate*, [1937] Ch. 423, 428.
(*f*) *Reddel* v. *Dobree* (1839), 10 Sim. 244; *Re Johnson*, 92 L. T. 357.
(*g*) *Ibid.*

the deceased decides the question of dominion, the retention of the key must be strong evidence that the intention is not to pass the dominion. The facts in *Reddel* v. *Dobree* (*f*) were in one respect more favourable to the claimant as she was instructed to have the box broken open in certain circumstances, yet the result was the same. A locked cash-box was delivered to the claimant, who was told by the deceased to go after his death to his son for the key, a piece of bone being attached to the key with the claimant's name inscribed thereon; she was also told to take the box to X, who would break it open for her if the son refused to hand over the key after the deceased's death. The son did refuse and the box was broken open. Shadwell, V.-C., in holding that there was no *donatio mortis causa*, said that the deceased "meant to retain to himself the complete dominion over whatever might be placed in the box. . . . There was nothing more than, to a certain extent, putting the plaintiff in possession of the box, but retaining to himself the absolute power over its contents" (*h*). There were also other facts unfavourable to the claimant: she was told to hand over the box every three months to the deceased, which she did on two occasions, he dying before the end of the third period when the box was due to be re-delivered. Shadwell, V.-C., seems to have thought that these facts alone were sufficient to prevent the claim succeeding.

There has been no case in which there was more than one key, one of the keys being retained by the deceased after handing over the receptacle and another key, but there is the opinion of Farwell, J. (*i*) that there would be insufficient delivery. This opinion, however, does not seem to coincide with the test of validity which Farwell, J., immediately proceeds to lay down: "There must be such a parting with the dominion over the chattels or the property as to prevent the subject-matter of the *donatio* being dealt with by the donor in the interval between the *donatio* and either the death or the return of the articles by the donee to the donor". He is using the word dominion in this passage in the sense of physical control but this seems wanting in the case put: the donee has complete power over the contents of the box and exclusive power also, unless he chooses to re-deliver the box. The ability of the donor to open the box is dependent not only on the retention of a second key but also on the consent of the donee to re-delivery which alone would make possible the use of the key retained.

If, however, the donor in handing over one key retains the

(*h*) 10 Sim., p. 251.
(*i*) *Re Craven's Estate*, [1937] Ch. 423, 428.

box as well as a duplicate key, it seems clear that there is no delivery of possession as the donor can still freely deal with the contents as he wishes : in the cases which decide that there is constructive delivery by delivery of a key it is assumed that there is only one key.

In the unique case of *Re Wasserberg* (*k*), discussed in the next section, there was held to be an effective delivery of documents in a locked box in the hands of a third party by delivery of the key to the donee, although the key alone was not sufficient to obtain access to the documents, the authority of the donor's executor being also required. But the donor did not retain a second key and, not having access, therefore, to the contents of the box, Farwell, J.'s test of validity was satisfied, although there would seem to have been no constructive delivery according to the ordinary rules of delivery by key.

Imperfect delivery.

It had always been accepted until *Re Wasserberg* (*k*) that the requirements of delivery, both of choses in possession and of the documents sufficient to pass choses in action, were the same as they are *inter vivos*. The statement to this effect of Wills, J., in *Cain* v. *Moon* has already been quoted (*l*). In holding that there may be constructive delivery by means of a key equity is but following the common law. The facts in *Re Wasserberg* were as follows : The donor, with the intention necessary to constitute a *donatio mortis causa*, delivered to his wife the key of a locked box containing bearer bonds; he did not hand over the box to her nor did he retain it himself. The box was deposited in a bank, and in a consultation with the bank manager it was made clear, and agreed to by the donor, that the manager would require the authorisation of the donor's executor to deliver the box to his wife : the key possessed by the wife was not sufficient authority for the manager to act. The box was duly opened under the directions of the executor, and Sargant, J., held that there was a valid *donatio mortis causa* of the bonds. He explained (*m*) that "there was a transfer to Mrs. W. of part of the means of getting at the bonds, of a partial dominion over them, and there was, of course, a corresponding deprivation of the testator's facilities for dealing with them"; this "partial or inchoate delivery or transfer" was "sufficient delivery to effectuate a *donatio mortis*

(*k*) [1915] 1 Ch. 195.

(*l*) *Supra*, p. 388. The rule of delivery acted on in that case is the same *inter vivos*: *Re Stoneham*, [1919] 1 Ch. 149, but because of *Re Wasserberg* Lawrence, J., doubts (p. 157) the statement of Wills, J.

(*m*) [1915] 1 Ch. 195, 203.

causa ". The case was concerned with things in action but the judgment also applies to choses in possession because, for the purposes of delivery, Sargant, J., treats the bonds as ordinary chattels, in accordance with the accepted rule. At the same time, he justifies his decision by the rule that equity will perfect an imperfect gift *mortis causa* of a thing in action provided *indicia* of title, as distinct from complete title, have passed : he extends the rule from imperfect transfer of title to imperfect delivery of *indicia* of title and draws no distinction between the latter and ordinary chattels. He saw " no more reason for declining to give effect to an incomplete or inchoate gift in the case of the one class of property than in the case of the other ". (That is, chattels of all kinds and choses in action.) " The requirement that there should be some act towards gift or transfer avoids equally in both classes of property the dangers attaching to mere nuncupative legacies . . . there is no reason in the nature of things why chattels as well as choses in action should not be in such a position that there should be some physical thing the possession of which should be required in order to get at the property and the transfer of which should accordingly amount to a transfer of the means or part of the means of getting at the property " (*n*).

The above case is not supported by previous authority except for a decision (*o*) of Kekewich, J., on different facts, which was reversed on appeal on other grounds; his decision was not cited to or by Sargant, J., in *Re Wasserberg*, which conflicts with the *ratio decidendi* of Wills, J., in *Cain* v. *Moon* (*p*). This case was also concerned with the delivery of *indicia* of title, namely, a deposit note. If the principle of transfer which *Re Wasserberg* embodies is applied generally, all the rules relating to delivery by way of *donatio mortis causa* will have to be reconsidered. The various doubts concerning delivery by means of a key might be resolved by applying the laxer test of delivery laid down. But in the briefly reported case of *Re Harrison* (*q*), in which *Re Wasserberg* is not mentioned as being cited, a different conclusion was reached on substantially similar facts. In his short judgment, Clauson, J., said that the delivery of the key " did not constitute such a delivery as was essential for the purpose of establishing a valid *donatio*

(*n*) *Ibid.* 203–4.

(*o*) *Wildish* v. *Fowler*, 5 T. L. R. 113; 6 T. L. R. 422, C. A.; 8 T. L. R. 457, H. L.

(*p*) *Supra*, p. 388, [1896] 2 Q. B. 283, Div. Ct. There is the consideration that the decision of a Divisional Court on appeal from a county court may be a superior authority to that of a High Court Judge of first instance; the latter's authority is in any case inferior to that of a contrary course of decisions.

(*q*) [1934] W. N. 25; 78 S. J. 135.

mortis causa. . . . There was no such delivery as was essential to constitute a gift, either *inter vivos* or *mortis causa*". The gift failed for this and other reasons.

Delivery to agent.

Delivery to one who can be called an agent for the donee is sufficient (*r*), but not delivery to one who is merely the agent of the donor (*s*). *Moore* v. *Darton* (*r*) is the only case holding that the transferee was an agent for the donee in which the question of sufficient delivery is at all discussed. The donor handed documents to her maid to take care of until after her death, when she was to deliver them immediately to the donee. Knight Bruce, V.-C., thought (*t*), "upon the evidence", that the documents were "placed in the hands of that person as the agent of Mr. M.", (the donee). It has been said in an Irish case (*u*), in which *Moore* v. *Darton* was not followed, that, having regard to the fact that the question as to agency was not the main point argued, it is not unlikely that some material fact beyond what appears in the report was put in evidence. At common law the donee would appear not to have constructive delivery unless the agent acknowledges to the donee that he holds for him (*x*). *Moore* v. *Darton* is certainly difficult to reconcile with the cases which hold that the agent was the agent of the donor only.

Knight Bruce, V.-C.'s own earlier decision in *Farquharson* v. *Cave* (*s*) seems to conflict with *Moore* v. *Darton*. A box and key were delivered to the agent, it appearing on the death of the deceased that a packet in the box was to be delivered to the claimant. In refusing his claim, Knight Bruce, V.-C., said that "a mere delivery to an agent, in the character of agent for the giver, would amount to nothing: it must be a delivery to the legatee, or someone for the legatee". It may be that there is a distinction between the two cases in that in the earlier one the agent was not told of the identity of the donee before the donor's death. In *Powell* v. *Hellicar* (*y*) the deceased delivered to her

(*r*) *Drury* v. *Smith* (1717), 1 P. Wms. 404; *Moore* v. *Darton* (1851), 4 De G. & Sm. 517; *Re Patterson*, 10 L. T. 520 (on appeal, 4 De G. J. & S. 422, the point is not discussed); *Re Korvine's Trusts*, [1921] 1 Ch. 343.

(*s*) *Farquharson* v. *Cave* (1846), 2 Coll. 356; *Powell* v. *Hellicar* (1858), 26 Beav. 261; *Re Kirkley*, 25 T. L. R. 522.

(*t*) 4 De G. & Sm., p. 520.

(*u*) *Re Thompson's Estate*, [1928] Ir. R. 606, 609, *per* Meredith, J., though it was said that the fact that the agent was the donor's servant did not in itself preclude her from being an agent for the donee.

(*x*) *Farina* v. *Home* (1846), 16 M. & W. 119; *Dublin Distillery, Ltd.* v. *Doherty*, [1914] A. C. 823.

(*y*) (1858), 26 Beav. 261.

servant the keys of two receptacles which she retained in her own possession, instructing the servant to deliver the keys to the claimant after her death. In holding that "there had been no delivery", Romilly, M.R., must have meant that the possession of the agent was not the possession of the intended donee, for delivery of the keys was constructive delivery of the receptacles. In *Re Kirkley* (*z*), where the deceased handed a packet to her servant to be delivered to the claimant after her death, Joyce, J., held that "there had been no delivery of the gift to the donee or any agent for him". "His Lordship thought at first that the case was very like *Moore* v. *Darton*, which was binding on him, but he was not sure whether other Judges would have taken the same view of that case as the learned Judge who decided it." In view of this decision and of the two previously mentioned it would appear that, on the point of agency, *Moore* v. *Darton* is not rightly decided. It is not easy to imagine a case in which a transferee who is to act on the donor's instructions after his death can be properly said, in the light of the above decisions, to hold possession as the agent of the donee.

In all the English cases the agent was appointed by the donor and instructed to make delivery to the donee only after the death of the former. In the Irish case of *Re Thompson's Estate* (*a*) the servant of the deceased was told to deliver, not on the death of the deceased, but on the claimant's return from England, which might have occurred, but did not occur, before the death of the deceased. The subject of the intended gift was duly delivered to the claimant on his arrival shortly after the death of the deceased. Meredith, J., held that there was no *donatio mortis causa*, though he said that he would have been glad to seize on any point in the evidence that would have enabled him to hold that the servant "was divested of her character as agent for the donor and invested with the character of agent for the donee" (*b*). Neither he nor counsel attached any importance to the fact that, unlike the English cases, the case was concerned with delivery by an agent which was not made dependant on death but on some other event which might have occurred *inter vivos*. If the transferee of the donor is ever to be treated as an agent for the donee, short of acknowledgment according to common law requirements, the above set of facts would seem to justify such treatment. The deceased would have delivered the property into the hands of the intended donee if he could have been present.

(*z*) 25 T. L. R. 522.
(*a*) [1928] Ir. R. 606.
(*b*) *Ibid.* 609.

If the condition on which delivery by the agent to the donee depends is satisfied in the lifetime of the donor but the agent disregards the instructions and does not deliver until after the death of the donor, or at all, the case is stronger than *Re Thompson's Estate* for holding there to be a valid *donatio mortis causa*.

To be distinguished from an agent who is intended to hold possession for the donee until delivery is made to him, is a trustee who takes the trust property by way of *donatio mortis causa*. A *donatio mortis causa* may be made subject to a trust or condition (*c*).

Things in Action.

There are difficulties in the way of making a *donatio mortis causa* of a chose in action which are not present in the case of a chose in possession. Title to a chose in possession can be transferred by delivery of the chattel as a gift, and the only peculiarity of a gift *mortis causa* is that the interest of the recipient does not become absolute until after the death of the donor: the gift is perfected by his death following the previous delivery; nothing remains to be done by his personal representative to complete the donee's title. But the position with regard to a chose in action is not so simple. In the very early cases there are indications that the Courts were not prepared to allow a *donatio mortis causa* to be made of a chose in action unless the title to it would, as in the case of a chose in possession, pass by delivery, that is to say, by delivery of a document of title such as certain negotiable instruments payable to bearer. This attitude was not maintained; a *donatio* was allowed to take effect in equity in another manner. Provided some document relating to the chose in action was delivered in the donor's lifetime it was sufficient, even though transfer of title did not go along with delivery of the document to the donee. Delivery of a banker's deposit receipt is a familiar example in the reports. In this type of case the donee's title does not become absolute by the death of the donor, yet equity will interfere to validate the gift: the title at law passes to the donor's personal representative, but equity, in the interests of the donee, will perfect the gift which is imperfect at law by treating the representative as a trustee to do what is necessary to secure the donee's legal title.

The majority of the cases are concerned with the classes of documents delivery of which justifies this equitable intervention,

(*c*) *Blount* v. *Burrow* (1792), 4 Bro. C. C. 72; *Hills* v. *Hills* (1841), 8 M. & W. 401; *Re Korvine's Trusts*, [1921] 1 Ch. 343.

for it is not the delivery of any document having some relation to the chose in action which is sufficient. There are limitations on the classes of documents, though the original limitations have been considerably relaxed by the modern development of the subject. The attention which this development has attracted has caused to fall into the background the question whether a complete transfer of title of a chose in action in the donor's lifetime is an adequate basis for a *donatio*. If title at law can, and does, pass by delivery of a document of title, there has never been any doubt that the gift will take effect. Where title has passed in some other way to the donee in the donor's lifetime, for example by a transfer of shares in a company's register, the case is equally strong, at least in one respect, for upholding the gift : the donee does not need the assistance of equity to perfect his gift as against the donor's personal representative. The few decisions in which a claim has been founded on the donee's title at law will be discussed under the next heading.

The Courts will now allow, much more readily than formerly, a *donatio mortis causa* of a thing in action to be made by delivery of a document which is in itself insufficient to pass title. Some of the earlier decisions insist that unless the legal property can pass by delivery there can be no such gift (*d*), but a change of principle was established by Lord Hardwicke in *Snellgrove* v. *Baily* (*e*), in which he held that a bond is a good subject of a *donatio mortis causa* in equity; delivery of the bond passes the debt for which it was given. In the leading case of *Ward* v. *Turner* he explained (*f*) that by delivery of the bond the donee was given the power to nullify the obligee's right of bringing an action on it by virtue of the rule of *profert* of a bond by the plaintiff in an action at law : the donee had no title at law, but by retaining possession of the bond he could prevent the donor from suing on his title. The donee also had the right to cancel, burn, or destroy the bond. This technical reason had no application to the delivery of receipts for South Sea annuities, which Lord Hardwicke held in the leading case could not be the subject of a *donatio*. With reference to *Snellgrove* v. *Baily* he said (*g*) : "If I went too far in that case, it is not a reason I should go further, and I choose to stop there". But subsequent Judges have gone much farther where the doctrine of *profert in curiam* would have

(*d*) *E.g.*, Jekyll, M.R.'s decisions in *Parthrick* v. *Freind* (1724), 2 Coll. 362 n., and *Miller* v. *Miller* (1735), 3 P. Wms. 356, which appear to conflict with his decision in *Lawson* v. *Lawson* (1718), 1 P. Wms. 441.

(*e*) (1744), 3 Atk. 214.

(*f*) (1752), 2 Ves. Sen. 431, 442.

(*g*) *Ibid.*

had no place, even supposing it still to exist. In Lord Eldon's exhaustive judgment in *Duffield* v. *Elwes* (*h*) it is pointed out that the doctrine of *profert* had become considerably relaxed, both in equity, by the development of its rules relating to lost instruments, and even at law. But in spite of these changes it was held that there was a good *donatio mortis causa* of a mortgage of a freehold estate by delivery of the mortgage deeds; the real and personal representatives of the donor were trustees for the donee to make the gift effective at law. The rule that equity will not perfect an imperfect gift does not apply when the gift is a *donatio mortis causa*.

With the obsolescence of Lord Hardwicke's technical justification for equity's interference, the delivery of many documents other than bonds and deeds has been held sufficient. *Moore* v. *Darton* (*i*) in 1851 is the point of departure. The lender delivered to the borrower a receipt for a loan which contained the terms of the loan. Knight Bruce, V.-C., took the point that the earlier cases had not gone to the length of deciding that the delivery of the mere evidence of a debt would be sufficient, for "the delivery of a bond is not the delivery of the mere evidence of a debt, for it is the delivery of that without which the debt would not have been a specialty". But he held that a *donatio* had been made because the debt in question being "created by writing, proof of the writing, if possible, was essential to recovery upon the contract. This writing was therefore in a sense essential to the proof of the contract; and it is this writing which was in substance delivered *mortis causa* to the person owing the money" (*k*). He was able to hold that the receipt was "something more" than the mere evidence of the debt, since a debt would have arisen without any writing but it would not have carried interest without an agreement to that effect.

In the numerous subsequent cases no one exclusive test of the validity of a *donatio mortis causa* of a thing in action is to be found. In *Re Weston* (*l*) Byrne, J., said: "The test appears to be whether or not the document, besides acknowledging the receipt of the money, expresses the terms on which it is held, and shows what the contract between the parties is." And Bowen, L.J., has said (*m*) that "speaking broadly, the subjects of *donationes mortis*

(*h*) (1827), 1 Bligh (N.S.) 497, H. L.

(*i*) 4 De G. & Sm. 517. (*k*) *Ibid.* 520–1.

(*l*) [1902] 1 Ch. 680, 685, following Cotton, L.J.'s statement of the effect of *Moore* v. *Darton* in *Re Dillon*, 44 Ch. D. 76, 82, C. A. Cf. *Re Richards*, [1921] 1 Ch. 513, 521; *Darlow* v. *Sparks*, 54 T. L. R. 627; *Delgoffe* v. *Fader*, [1939] Ch. 922, 928 and other cases.

(*m*) *Re Hughes*, 59 L. T. 586, 587; similarly Cotton, L.J., *ibid.* Applied, *Re Davis*, 86 L. T. 889.

causa must be things the title to which, or the evidence of title to which, passes by delivery". Luxmoore, L.J., enunciates the test that "there must be delivery of the subject-matter of the gift to the donee, or, I think, a transfer of the means of, or part of the means of, getting at the property" (*n*). This is compatible with the former tests for it simply gives the reason behind those tests, as does the criterion of Farwell, J., in *Re Craven's Estate* (*o*) already quoted. But a negative reply must be given to Byrne, J.'s question: "Is not the true test this—Has the donor done all in his power to transfer the property?" (*p*). Underlying the question is the thought of a similar test that has been applied by equity to the assignment *inter vivos* of choses in action. The answer was given by Lord Eldon in *Duffield* v. *Elwes* (*q*): "I apprehend that really the question does not turn at all upon what the donor could do, or what the donor could not do; but if it was a good *donatio mortis causa*, what the donee of that donor could call upon the representatives of the donor to do after the death of that donor."

The width of the criterion or criteria of validity has perhaps led to inconsistent treatment of the various documents which have come before the Courts. Certainly the indefiniteness of the principle involved makes it difficult to forecast the result of a judicial review of a new class of document (*r*). The different classes of things in action must therefore be considered separately. But there is the preliminary question of whether a transfer of title, as distinct from a document relating to title, is a foundation for a *donatio mortis causa*.

Transfer of title.

If the title to the thing in action is transferred at law *inter vivos* the transferee may hold by way of *donatio mortis causa* (*s*). In such a case the donee holds subject to a condition avoiding his claim on the recovery of the donor from the illness in respect of which the gift was made: such a condition is valid in equity. If the donor does not recover, the donee's title is indefeasible in equity as well as at law. Where a complete legal title has been transferred the donee has no need to ask for the assistance of

(*n*) *Delgoffe* v. *Fader*, [1939] Ch. 922, 927.
(*o*) [1937] Ch. 423, 428, *supra*, p. 392.
(*p*) *Re Weston, op cit.* 683.
(*q*) (1827), 1 Bligh (N.S.) 497, 530–1, H. L.
(*r*) There is still some truth in the remark of counsel in *Duffield* v. *Elwes*, *op. cit.* 508: "The effect of these nice distinctions is to increase litigation, because no advice can be given in such a state of the law."
(*s*) *Staniland* v. *Willott* (1852), 3 Mac. & G. 664; *Re Korvine's Trusts*, [1921] 1 Ch. 343; *Re Craven's Estate*, [1937] Ch. 423.

equity to perfect the gift by treating the personal representative as a trustee for him. Lord Hardwicke in *Ward* v. *Turner* (*t*) said that there was less reason for allowing a *donatio mortis causa* in the case of delivery of the receipts for South Sea annuities "than in the case of any other chose in action, because stocks and annuities are capable of a transfer of the legal property by Act of Parliament, which might be done easily". The position he visualised arose in *Staniland* v. *Willott* (*s*). There had been an actual transfer of shares in the share register of a company, and Lord Truro, L.C., on appeal, said with regard to the fact that there had been a transfer: "So far from this being a reason against construing the gift to be a *donatio mortis causa*, it was at one time thought that a complete legal title was necessary to the perfection of such a gift" (*u*). He thought that transfer of title was the equivalent of delivery of a chattel: "But it has never been held that, because the act of delivery is such as would in the case of a gift *inter vivos* confer a complete legal title, the gift cannot be a *donatio mortis causa*. The act of delivery, or that which is equivalent thereto, is one thing, and the gift partly made thereby is another thing." In this case the gift did not take effect because the donor recovered from the illness in respect of which the gift was made. Upon his recovery the intended donee was held to be a trustee of the shares for the donor, the event on which the gift was in equity dependent not having occurred: it was the donor who had to seek the aid of equity and he successfully did so.

In *Re Korvine's Trusts* (*s*) the transferee took a joint legal title with the donor and the *donatio* was upheld on the death of the latter. The donor made the transferee joint holder of a banking account in the donor's lifetime on trust after his death to pay debts and to hold the surplus for X. X's equitable claim against the transferee to a *donatio mortis causa* of the surplus was allowed.

Where there has been a complete transfer of title there is no necessity for the transfer itself to express the condition on which the gift is dependent, namely, the death of the transferor. That condition may operate *ab extra*. It may be expressed in writing, orally, or be inferred from conduct. In *Staniland* v. *Willott* (*s*) it was held to be no objection to the gift that the intention that it was to take full effect not *inter vivos* but *mortis causa* was inferred from the general circumstances of the transaction and the conduct of the donor and the donee. Lord Truro, L.C., was assisted by the fact, among others, that the donor had, in addition to trans-

(*t*) (1752), 2 Ves. Sen. 431, 443.
(*u*) 3 Mac. & G., p. 676.

ferring the shares in the share register, delivered his watch, "an article for which men have occasion during their lives"; the Lord Chancellor also held that the fact that the donor was "a frugal man" "much interested in his property, is not to be disregarded in estimating his motives and intentions at the time of the gift".

The grant *inter vivos* of a power of attorney to the intended donee is insufficient for the grant of a *donatio* of property subject to the power if the donee does not act on the power in the donor's lifetime; but there will be a good *donatio* to the extent to which the donee acts on the power *inter vivos*, at least if he acts on it on the specific instructions of the donor (*x*). The death of the donor revokes the power in so far as it is not acted on. In *Re Craven's Estate* (*x*) the donee had been granted a power of attorney over money and securities in a bank abroad; the donor later instructed him to obtain a transfer into his own name. The money was accordingly transferred *inter vivos* and he instructed the bank, also in the donor's lifetime, to transfer the securities; two days after the donor's death the bank wrote to the donee to announce that the securities had been duly transferred also. Farwell, J., held that the mere giving of a power of attorney "is not such a parting with dominion as is required to constitute a valid *donatio mortis causa*" (*y*) because the position of the donee of a power is merely to act as agent, there being nothing to prevent the principal dealing with the property notwithstanding it. But he upheld the gift, there being evidence that the donor instructed the donee, her son, "to get the particular shares and money transferred into his own name in the bank abroad and that he acted on these instructions, and in my judgment by procuring the transfer of the property into her son's name the testatrix did what was necessary in order to part with dominion" (*z*). No question seems to have been raised (*a*) as to whether the transfers had actually occurred before the donor's death : the transfer of the securities, though not of the money, was apparently post mortem. But Farwell, J.'s words cover both : she could be said to have procured the transfer of the securities as well as of the money, and her instructions, which were acted on, covered both. Earlier in the judgment, in another connection, the term dominion had been used in the sense of possession, but in the above passage it is used in its natural sense of ownership. The donor had done what was necessary to part

(*x*) *Re Craven's Estate*, [1937] Ch. 423.
(*y*) *Ibid.* 428.
(*z*) *Ibid.* 429.
(*a*) As pointed out in a note in The Conveyancer, vol. 2, 184.

with her ownership to the donee in her lifetime, though it would appear that in fact title to the securities did not pass to the donee until after the donor's death.

Assignment.

There has been no case in which the Court has had to answer the question whether a statutory assignment of a chose in action under section 136 of the Law of Property Act, 1925, is a sufficient foundation for a *donatio mortis causa*. *Inter vivos* a statutory assignment may operate as a gift, for no consideration is required (*b*). A statutory assignment is valid at law and to that extent it is equivalent to a complete transfer of title which is a sufficient basis for a *donatio mortis causa*: in neither case does the donee need the assistance of equity to perfect his gift. For example, it has been held that a *donatio* may be made by transfer *inter vivos* of the donor's banking account into the name of the donee (*c*); can the same result be achieved by a statutory assignment *inter vivos* to the donee of a debt owing to the donor? Section 136 is confined to an "absolute" assignment, but it has been held that this means merely that the assignor must have parted with his entire interest and does not prevent a statutory assignment from being subject to a provision for re-assignment (*d*) or from being on trust for the assignor himself (*e*). Thus, *prima facie*, the donor could carry out his intention to make a *donatio mortis causa* by assigning the thing in action subject to a provision for re-assignment in the event of his recovery from his illness, or by assigning subject to a trust for himself dependent on the same event. But it is clear that an assignment under section 136 cannot be a conditional one (*f*): the operation of the assignment must not be made to depend on the donor's death if a *donatio mortis causa* be intended. A provision for re-assignment inserted in the recital to the assignment does not, however, prevent it from taking effect as an absolute statutory assignment (*g*), and thus a provision in the recital for re-assignment on the donor's recovery would not invalidate it as a statutory assignment. *Re Williams* (*h*) is a case of an assignment failing because it was conditional on the assignor's death; the assignment did not operate to transfer the

(*b*) *Re Westerton*, [1919] 2 Ch. 104.
(*c*) *Re Korvine's Trusts*, [1921] 1 Ch. 343; *Re Craven's Estate*, [1937] Ch. 423.
(*d*) *Tancred* v. *Delagoa Bay Ry.*, 23 Q. B. D. 239, approved, *Durham Bros.* v. *Robertson*, [1898] 1 Q. B. 765, C. A.; *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190, C. A.
(*e*) *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511; *Comfort* v. *Betts*, [1891] 1 Q. B. 737.
(*f*) *E.g.*, *Re Williams*, [1917] 1 Ch. 1, C. A.
(*g*) *Tancred* v. *Delagoa Bay Ry.*, *op. cit.*
(*h*) [1917] 1 Ch. 1, C. A.

interest to the donee *inter vivos* at all : it was not a case of a provision for re-assignment in a certain event. No question of a *donatio mortis causa* was involved in this case because the assignment, although gratuitous and not intended to take effect until death, was not made in expectation of impending death as a *donatio mortis causa* must be.

On the analogy of the cases concerned with a complete transfer of title at law, the donor's intention that his statutory assignment should operate as a *donatio mortis causa* in equity could be proved by evidence outside the assignment, even outside the recital to the assignment. There would be no difficulty in the way of applying this analogy to a statutory assignment, for Chitty, L.J., said (*i*), with regard to a case in which a provision for re-assignment was held valid : " I think the principle of the decision ought not to be confined to the case where there is an express provision for re-assignment. Where there is an absolute assignment of the debt, but by way of security, equity would imply a right to a re-assignment on redemption, and the sub-section would apply to the case of such an absolute assignment ". If the assignment were by way of *donatio mortis causa* equity could, with equal ease, imply a right to re-assignment in the event of the recovery of the assignor from his illness; if the assignor died the assignee would not require the assistance of equity to perfect his gift, because, under section 136 of the Law of Property Act, 1925, his interest is valid at law and he would therefore take, not under, but against the personal representative.

But by whatever method it were attempted to base a *donatio mortis causa* on a statutory assignment, it might be held that it was an attempt to make a *donatio mortis causa* by writing, and that in English law, whatever the position in Roman law, the gift cannot be made by writing. A *donatio* by statutory assignment might well be held to be too glaring a disregard of the policy of the Wills Act (*k*). In *Re Williams* (*h*) the Court of Appeal gave as an additional reason for declaring void an assignment conditional on the donor's death that it was a testamentary document not fully executed. The assignment could not have operated at law because it was conditional at law, not absolute, and the fundamental requisite of a *donatio mortis causa* was not present as the assignment was not made in expectation of death; but the Court might adopt the same view that an assignment was a testamentary document not duly executed, even if it were not open to the objection of being conditional at law and if the inten-

(*i*) *Durham Bros.* v. *Robertson*, *op. cit.*, p. 772.
(*k*) Cf. Bowen, L.J., in *Re Hughes*, 59 L. T. 586, C. A., cited *infra*, p. 406.

tion to make a *donatio mortis causa* were proved in one of the ways suggested above (*l*).

If a statutory assignment be of no avail because of the policy of the Wills Act, still less will an equitable assignment serve as a foundation for a *donatio mortis causa*. Even *inter vivos* there are few equitable assignments which are valid without consideration : perhaps none are valid unless by deed, if value is not given. There has been no instance in which a claim has been founded on a gratuitous equitable assignment which would have been valid in equity *inter vivos*. In *Jones* v. *Edwards* (*m*) a gratuitous equitable assignment was held to fail both *inter vivos* and *mortis causa*. Lord Cottenham, L.C., said that "the very fact of the transaction being in writing is a strong circumstance against the presumption of the gift being intended to operate as a *donatio mortis causa*" (*n*). Apart from the requisite intention on the part of the donor being lacking, the claim failed for the following reason : "Here is an instrument purporting to be a regular assignment, exactly in the same form as where the purpose is absolutely and at once to pass the whole interest in the subject-matter. A party making a *donatio mortis causa* does not part with the whole interest, save only in a certain event, and it is of the essence of the gift that it shall not otherwise take effect. A *donatio mortis causa* leaves the whole title in the donor, unless the event occurs which is to divest him" (*n*). A bond had been delivered by the obligee with an indorsement containing what purported to be an immediate, absolute assignment of the obligee's interest. The assignment was of no effect either as an ordinary gift or as a *donatio mortis causa*. Lord Truro, L.C., explained in a later case (*o*) that in the above passage Lord Cottenham was not denying that a *donatio* might take effect by transfer of title when he said that a *donatio* leaves the whole title in the donor : "He was speaking of the gift itself, and not of the mere act of delivery, or that which is equivalent thereto", and transfer of title is equivalent to delivery. As thus explained, Lord Cottenham's remarks cannot be applied to a statutory assignment, for title at law to the chose in action passes by it. The present question is whether a gratuitous equitable assignment, which would operate

(*l*) [1919] 1 Ch. 1. Under the Post Office Savings Bank Regulations a *post mortem* disposition of funds in a Post Office Savings Bank may be made by means of a nomination form. In *Pearman* v. *Charlton*, 44 T. L. R. 517, the nomination form was invalid because it was not properly witnessed ; Wright, J., also held that there was no ground for the contention that there was a *donatio mortis causa*, but he gives no reasons.

(*m*) (1836), 1 My. & Cr. 226.

(*n*) *Ibid.* 235.

(*o*) *Staniland* v. *Willott* (1852), 3 Mac. & G. 664, 676.

inter vivos, is equivalent to delivery of a chattel or to complete transfer of title of a chose in action as *donatio mortis causa*. *Jones* v. *Edwards* does not raise this issue. Such an assignment must clearly not be conditional on the death of the donor, for an equitable assignment must pass the immediate equitable interest to the assignee. But may it be good if the intention that it is to operate as a *donatio mortis causa* (*i.e.*, that the interest assigned is returnable if the donor recover) is proved by evidence *dehors* the assignment, or by a recital to it? The assistance of equity would, of course, be required to perfect such an imperfect gift as against the assignor's personal representative, but this in itself is no objection to a *donatio mortis causa* being created by an equitable assignment: equity will perfect an imperfect gift *mortis causa* on numerous occasions if some document relating to the title of the chose in action be delivered to the donee.

The judgments in *Re Hughes* (*p*) lend support to the opinion that a *donatio mortis causa* cannot be made by way of equitable assignment, though that decision is not conclusive. In that case the disposition failed because the requisite intention to make a *donatio* was lacking, but other reasons were given for the decision. The deceased signed a document to this effect: "I give all my insurance money coming to me to my wife and also the money on deposit at my bankers". Neither the insurance policy itself nor the deposit receipt was delivered to the wife, the claimant; there could, therefore, be no *donatio* by the most usual method of giving choses in action, namely, the delivery of a document bearing on title. The Court assumed that the document was inoperative as a statutory assignment, though it would seem that the intended assignment of the sum on deposit might have been treated as a statutory assignment. The statute requires notice to be given to the debtor, but it has been held that notice is valid although it is not given to the debtor until after the assignor's death (*q*). But Cotton and Bowen, L.JJ., went further and held that the document was not valid as an equitable assignment and that, speaking generally, the subjects of *donationes mortis causa* must be things the title to which, or the evidence of title to which, passes by delivery. Bowen, L.J., more specifically added: "Where, as in the present case, there is no change of possession operating as an immediate transfer, the doctrine of *donatio mortis causa* is not applicable. If we decided otherwise we should, in effect, be enabling persons to drive a coach and four through the Wills Act". This statement would also condemn an attempted

(*p*) 59 L. T. 586, C. A.
(*q*) *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.

donatio mortis causa by way of an equitable assignment which would have been valid *inter vivos* and, indeed, such a gift purporting to be made by way of statutory assignment. It seems probable that this opinion will prevail.

Bonds.

Delivery of a bond by way of *donatio mortis causa* passes the sums represented by it (*r*). In *Re Richards* (*r*) there was delivery of an envelope containing ten registered Victory bonds. Eve, J., upheld the gift as "each bond not only acknowledges receipt of the money but expresses all the terms on which the money is held and shows the whole contract between the Government and the lender" (*s*). At the present day cases concerned with bonds are in no need of justification from the old law of *profert*.

Bankers' deposit notes.

Delivery of a banker's deposit note or receipt is sufficient (*t*). In *Re Dillon* (*t*), the leading case, the donor, in addition to delivering the note, filled in and signed a form of cheque which was indorsed on the deposit note. The Court of Appeal assumed that there could be no valid *donatio* of the donor's own cheque but allowed the gift as the intention was, not merely to give the cheque, but to give the deposit note and the sum it acknowledged; the gift was not defeated by giving the cheque along with the note in order to supplement it. Cotton, L.J., explained that the bank did not make it part of their bargain that they would not pay unless the cheque were signed and produced; if the document were lost they would require some explanation but he did not think they could refuse to pay. With reference to the decision in *Moore* v. *Darton* (*u*), which he approved, Cotton, L.J., said that the donee there held a document which, besides acknowledging the receipt of the money, expressed the terms on which it was held, and showed what the contract between the parties was; it is clear that he thought a similar test was applicable, and satisfied, in the case before him. It can also be said that the donee of the deposit note, although he was granted no legal title, was possessed

(*r*) *Snellgrove* v. *Baily* (1744), 3 Atk. 214; *Gardner* v. *Parker* (1818), 3 Madd. 184; *Meredith* v. *Watson* (1853), 2 Eq. Rep. 5; *Re Mustapha*, 8 T. L. R. 160; *Re Wasserberg*, [1915] 1 Ch. 195; *Re Korvine's Trusts*, [1921] 1 Ch. 343; *Re Richards*, [1921] 1 Ch. 513.

(*s*) *Ibid.* 521.

(*t*) *Amis* v. *Witt* (1863), 33 Beav. 619; *Moore* v. *Moore*, L. R. 18 Eq. 474; *Re Taylor*, 56 L. J. Ch. 597; *Re Farman*, 57 L. J. Ch. 637; *Re Dillon*, 44 Ch. D. 76, C. A.; *Cain* v. *Moon*, [1896] 2 Q. B. 283; *Hudson* v. *Spencer*, [1910] 2 Ch. 285.

(*u*) (1851), 4 De G. & Sm. 517.

of the means, or part of the means, of enforcing the claim, and, conversely, he was in a position to make it more difficult for the donor to enforce the claim. Delivery of the deposit note had the same practical effect as delivery of a bond.

It can now be taken that there is no necessity to fill in the cheque form if the deposit receipt or note contains one. After the decision in *Re Dillon, Re Mead* (*x*), where the facts were similar, must be taken to be decided on the ground that there was an intention to give by means of the cheque indorsed on the note and by the cheque alone (*y*).

A deposit account book is treated differently from a deposit note: it is not a good subject of a *donatio mortis causa* (*z*). Luxmoore, L.J., sitting at first instance, held (*z*) that there was no difference in this respect between a deposit account book and an ordinary pass book of a current account, both of which failed to satisfy the test of a valid *donatio mortis causa*. The evidence showed that it was in no way necessary to be produced when the depositor required to withdraw his money and, further, the terms of the deposit transaction did not appear in the book: nothing was said with regard to the interest to be paid, nor with regard to the mode of withdrawal beyond the statement that seven days' notice of withdrawal was required. For these reasons Luxmoore, L.J., held that the book did not satisfy the test that the document delivered must be "essential to the recovery of the debt" (*a*). But even a deposit note is not essential to the recovery of the sum deposited, as was explained in *Re Dillon*. More accurate was Luxmoore, L.J.'s own previous enunciation of the requirement: "A transfer of the means, or part of the means of, getting at the property" (*b*).

Post Office securities and documents.

Delivery of a Post Office Savings Bank deposit book is sufficient (*c*). In *Re Weston* (*c*) Byrne, J., was quite unable to say that the book was not distinguishable from any ordinary banker's pass book and he held that it fulfilled the test laid down by Cotton, L.J., in *Re Dillon* (*d*) in that although every rule regulating the contract was not set out in the book itself, all the essential rules were: "The book is not a mere receipt. It must,

(*x*) 15 Ch. D. 651.
(*y*) *Per* Cotton, L.J., *Re Dillon, op. cit.*, p. 82.
(*z*) *Delgoffe* v. *Fader*, [1939] Ch. 922.
(*a*) Adopting the test of Lord Ashbourne, C., in *Duckworth* v. *Lee*, [1899] 1 Ir. R. 405, 407.
(*b*) *Delgoffe* v. *Fader, op. cit.* 927.
(*c*) *Re Weston*, [1902] 1 Ch. 680; *Re Andrews*, [1902] 2 Ch. 394.
(*d*) *Supra*, p. 407.

as stated on the face of it, be produced whenever any money is deposited or withdrawn, and it contains the terms of the contract as to payment of interest and withdrawal, as well as the other material terms of the contract between the depositor and the Savings Bank Department" (*e*).

Books containing War Savings Certificates and National Savings Certificates are also the subject of a *donatio mortis causa* (*f*). Bennett, J., in *Darlow* v. *Sparks* (*f*) regarded the certificates as substantially indistinguishable from a Post Office Savings Bank deposit book and followed *Re Weston*.

An "Exchequer Bond Deposit Book" issued by the Post Office and containing a certificate of the holder's title to registered Exchequer bonds acquired through the Post Office may be delivered as a *donatio mortis causa* (*g*). In *Re Lee* (*g*) the book was the only document of title that existed with regard to the bonds, and no bonds were either handed over to the Post Office or otherwise segregated in connection with the transaction. Astbury, J., thought these facts were quite sufficient to differentiate the case from *Re Andrews* (*h*).

In *Re Andrews* (*h*) Kekewich, J., held that where a deposit is invested by the Post Office Savings Bank for the depositor in Government stock, under the regulations contained in the deposit book, by having the stock placed on the Savings Bank Investment Account of the National Debt Commissioners and credited to the depositor, the delivery of the investment certificate and the deposit book cannot constitute a *donatio mortis causa* of the Government stock. He was right in thinking that if the stock were invested in the deceased's own name in the ordinary way, delivery of the stock certificate would be insufficient (*i*). But the transaction before the Court was of a special type. The bank acted as trustee for the depositor but trustee, not of stock which had been actually transferred, but of a mere credit in the books of the Commissioners representing a certain amount of local loan stock. The so-called investment certificate represented the depositor's equitable interest under this arrangement; he could deal with the sum thus "invested" without the formalities of legal transfer and almost as freely as with sums on deposit in the Savings Bank proper. Astbury, J.'s opinion, therefore, that the decision is difficult to reconcile with authority is sound. Kekewich, J., followed *Re*

(*e*) [1902] 1 Ch. pp. 685, 686.
(*f*) 54 T. L. R. 627; [1938] 2 All E. R. 235.
(*g*) *Ree Lee*, [1918] 2 Ch. 320.
(*h*) [1902] 2 Ch. 394.
(*i*) See *infra*, p. 416.

Weston (*k*) with regard to the sum deposited in the bank, and it would seem that the principle of that case also covers the particular stock investment certificates. Astbury, J., thought that the decision was difficult to reconcile with the judgment of the Court of Appeal in *Re Dillon*, and the subsequent case of *Darlow* v. *Sparks* (*l*), in which delivery of a National Savings Certificates book was held sufficient, tends to support this criticism. Nevertheless, the history of the *donatio mortis causa* affords some justification for the attitude taken up by Kekewich, J., in the following passage from his judgment : " Notwithstanding that there have been some cases of late years in which the doctrine has been extended, I do not think that this extension ought to be allowed. I agree it is only going a little further; but it is a substantial step, and I do not think it is a step which ought to be taken " (*m*).

Bills, notes, and cheques not drawn by the donor.

A bill of exchange payable to the donor or order may be the subject of a *donatio mortis causa*, both when it falls due before the donor's death and the donee receives the amounts falling due (*n*), and when it falls due after the donor's death and he dies without having indorsed it (*o*). *A fortiori*, will delivery of a bearer bill be sufficient? (*p*).

A promissory note payable to the donor or order on demand is within the same rule as a bill of exchange and delivery of it is sufficient though unindorsed (*q*). Romilly, M.R., thought it was " a much more healthy state of the law that the validity of such a gift should not depend on whether the testator had written his name on the back of the bill or not, if it be clear that he intended to give them " (*r*). It may be assumed that a promissory note payable at a date subsequent to the death of the donor and a note payable to bearer are, like bills of exchange, good subjects of a *donatio mortis causa*.

A cheque payable to the donor or order but not indorsed is on the same footing as a bill or note and is sufficient: Chitty, J., had no doubt about it (*s*). So also would a bearer cheque be sufficient. Delivery of a cheque of a third party payable to the donee, which has been exchanged for a cheque of the donor paid

(*k*) [1902] 1 Ch. 680, *supra*, p. 408.
(*l*) *Cit. supra.*
(*m*) *Re Andrews*, *op. cit.* 398.
(*n*) *Ranklin* v. *Weguelin* (1832), 27 Beav. 309.
(*o*) *Re Mead*, 15 Ch. D. 651.
(*p*) See *Miller* v. *Miller* (1735), 3 P. Wms. 356; *Hill* v. *Chapman* (1789), 2 Bro. C. C. 612.
(*q*) *Veal* v. *Veal* (1859), 27 Beav. 303.
(*r*) *Ibid.* 309.
(*s*) *Clement* v. *Cheesman*, 27 Ch. D. 631.

to the third party before the former's death, is sufficient though the third party's cheque is only paid after the donor's death (*t*).

Bills, notes, and cheques drawn by the donor.

A distinction must be noticed between cases in which the instrument has been transferred by the donee and where it has not.

(1) *Where the donee has not transferred it.*—The deceased's own promissory note in favour of the intended donee, and payable on demand, is not the subject of a *donatio mortis causa* when it is presented for payment by the intended donee after the deceased's death (*u*). In *Re Leaper* Sargant, J., distinguished (*x*) the case from the delivery of a third person's promissory note which constitutes *indicia* of title to a species of property belonging to the donor: by handing his own note to the intended donee "he is not transferring or attempting to transfer property, but is merely making an attempt—in itself imperfect—to create a general liability against himself, or rather his estate". He thought that to deprive the executors of the deceased in such a case of the right to plead want of consideration was "no greater interference than to compel them in the ordinary case to perfect an imperfect transfer", but it was "a different interference" and its adoption would, he thought, "involve the creation of a new class of *donationes mortis causa*".

It would seem that the delivery of the deceased's bill of exchange in favour of the intended donee is also not sufficient, in spite of the early case of *Lawson* v. *Lawson* (*y*). In that case the donor drew a bill on his goldsmith to pay his wife £100 for mourning, but so many particular circumstances were stressed by Jekyll, M.R., that the *ratio decidendi* does not appear (*z*). Lord Loughborough, L.C., thinks (*a*) that it was decided on the ground that there was an appointment of the money in the hands of the goldsmith, but this interpretation would probably not now be given to such a transaction in view of the rule that a cheque does not operate as an assignment or appointment of funds in the hands of the person on whom it is drawn.

The delivery of the deceased's cheque in favour of the intended donee, which is not presented before the former's death, cannot constitute a *donatio mortis causa* (*b*). Nor does it make any

(*t*) *Bouts* v. *Ellis* (1853), 17 Beav. 121; aff. 4 De G. M. & G. 249.
(*u*) *Tate* v. *Hilbert* (1793), 2 Ves. 111; *Re Leaper*, [1916] 1 Ch. 579.
(*x*) *Ibid.* 582.
(*y*) (1718), 1 P. Wms. 441.
(*z*) *Per* Lord Loughborough, L.C., *Tate* v. *Hilbert*, *op cit.* 121. Cf. Romilly, M.R., *Hewitt* v. *Kaye*, L. R. 6 Eq. 198, 200.
(*a*) *Tate* v. *Hilbert*, *op. cit.* 121.
(*b*) *Tate* v. *Hilbert* (1793), 2 Ves. 111; *Hewitt* v. *Kaye*, L. R. 6 Eq. 198; *Re Beak's Estate*, L. R. 13 Eq. 489; *Re Davis*, 86 L. T. 889.

difference if the cheque is paid into the claimant's account before the deceased's death if it is presented after his death and payment is refused merely on the ground that the cheque is post-dated (*c*). In *Re Beak's Estate* (*d*) it was held that the position is not altered if delivery of the cheque to the claimant is accompanied by delivery of the pass book of the account on which the cheque is drawn. Bacon, V.-C., thought that the difference between a pass book and a deposit note in this respect was enormous.

If the deceased's cheque is presented for payment before his death but not paid before his death there is no *donatio* (*e*). In *Re Beaumont* (*e*) payment on presentation was refused because of a doubt as to the drawer's signature, and the bank, having notice of his death before they received confirmation of the signature, refused to pay. Buckley, J., said that it must "be shown that the donor handed over either property, or the *indicia* of title to property, which belonged to him. His own cheque is not property; it is only a revocable order" (*f*). Notice of death is revocation of the banker's authority to pay. It was held in the unsatisfactory case of *Bromley* v. *Brunton* (*g*) that there could be a dedication by the banker of the amount of the cheque to the payee which would, on the principle of an assignment, be equivalent to actual payment. In that case the account was in credit but the bank refused to pay because of a doubt of the signature; in *Re Beaumont* the account was overdrawn though the cheque would nevertheless have been paid if it had not been for the doubt of the signature, but, as Buckley, J., declared, there could not possibly have been an appropriation of funds, even if that were possible at law, because the deceased had no funds there. It is very doubtful since *Re Swinburne* (*h*) whether such an appropriation of funds by the banker has any legal effect. In that case, though it was not necessary to overrule *Bromley* v. *Brunton* as the account was overdrawn and no appropriation could have taken place, the decision was strongly disapproved of by all the members of the Court of Appeal. Sargant, L.J., who had argued the case of *Re Beaumont*, said that Buckley, J., also really thoroughly disapproved of *Bromley* v. *Brunton*, "although he found a possible way of reconciling it with the judgment he was about to give".

Delivery of a cheque which is not paid on presentation because

(*c*) *Re While*, [1928] W. N. 182.
(*d*) L. R. 13 Eq. 489.
(*e*) *Re Beaumont*, [1902] 1 Ch. 889; approved, *Re Swinburne*, [1926] Ch. 38, C. A., where, in similar circumstances, an *inter vivos* gift was intended.
(*f*) [1902] 1 Ch. pp. 894, 895.
(*g*) L. R. 6 Eq. 275.
(*h*) [1926] Ch. 38, C. A.

the period required for notice of withdrawal, which has been given, has not expired before the death of the drawer is not sufficient (*i*).

If the cheque is paid before the death of the donor there is a good *donatio mortis causa* (*k*). It was held in *Re While* (*l*) that it is sufficient if the bank credits the donee at the donor's bank with the amount of the cheque. There was held to be an acceptance of the cheque for this purpose in unusual circumstances. The cheque was handed to the bank manager at the donor's house with instructions to open an account in the name of the donee for the amount of the cheque; the donor died little more than an hour after the manager left the house with the cheque. Tomlin, J., took the view that "the bank manager received the cheque in the exercise of his authority as a bank official, and that the matter was complete when he had once accepted the cheque". If the cheque is not paid or credited in this way the donee cannot sue the executor on the cheque because the former is not a holder for value.

The banker is justified in paying in ignorance of the death of the drawer, for under section 75 of the Bills of Exchange Act, 1882, it is notice of the customer's death that determines his duty and authority to pay. But can the payee, the intended donee, retain the money as a *donatio mortis causa* if the banker pays in ignorance of the death of the intending donor? The point has not arisen, but there is the opinion of Lord Loughborough, L.C., that he can (*m*). It would seem to make no difference if the donee knows of the donor's death before receiving payment, for the donee would be under no duty of disclosure of that fact. But against Lord Loughborough's opinion is the consideration that there has been no delivery in the deceased's lifetime, delivery of the cheque being *ex hypothesi* insufficient; if his view be correct there would be an infraction of the fundamental principle of delivery.

(2) *Where the donee has transferred the instrument.*—If the donor's cheque payable to donee or order has been negotiated in the donor's lifetime but presented for payment after his death there may, in some circumstances, be a valid *donatio mortis causa* (*n*). In *Rolls* v. *Pearce* (*n*) the donor while in a foreign country drew cheques on his London bankers in favour of the donee or order. The latter drew upon the cheques after paying them into a bank which indorsed them to other persons. On

(*i*) *Re Mead*, 15 Ch. D. 651.
(*k*) *Bouts* v. *Ellis* (1863), 17 Beav. 121; affirmed, 4 De G. M. & G. 249.
(*l*) [1928] W. N. 182.
(*m*) *Tate* v. *Hilbert* (1793), 2 Ves. 111, 118.
(*n*) 5 Ch. D. 730.

presentation by the holders after the donor's death payment was refused and the donee thereupon refunded to the donor's estate the amount she had received on the cheques. Malins, V.-C., held that the donee was entitled to payment of the full amount of the cheques out of the estate as there had been a valid *donatio mortis causa*. It is to be noted, however, that Malins, V.-C., relied on the fact that the cheques could not have been presented for payment immediately. He said: "These are cheques payable to order, and it is clear that the testator knew that they could not be presented for payment either on the day they were drawn or the subsequent day. I must attribute to him the knowledge that the cheques would not be paid for some time, and on that ground I come to the conclusion that this case differs from the other cases of cheques" (*o*). The Vice-Chancellor relied on the analogy of a bill of exchange and also on the fact that the cheques were order cheques, as appears from the passage quoted below. The principle seems to be that as an order cheque is, or may be, intended by the donor to be negotiated, he is treating it as a valuable piece of property in itself, as distinct from an order to his banker to pay the donee, and therefore, if it is also so treated by the donee, delivery of the cheque is sufficient; this construction is aided by the fact that the donor knows that the cheque cannot be paid for some time. According to Malins, V.-C., the last fact, in addition to the others, is essential. But would it always be insisted on, supposing that *Rolls* v. *Pearce* is followed? (*p*). The analogy of a bill of exchange seems a sound support for the decision.

Delivery of a bearer cheque which is negotiated but not presented until after the drawer's death would appear to be insufficient. In the above case Malins, V.-C., said: "If these cheques had been made payable to bearer and had not been presented for payment at the bank on which they were drawn before the donor's death, I should probably have considered that I was bound to hold that there was not a good gift" (*q*). In such a case it cannot be presumed that the donor intended the cheque to be negotiated before payment.

(*o*) *Ibid.* 733–4.

(*p*) This case seems to be doubted by Fry, J., in *Re Mead* (in the L. T. report of the case: 43 L. T. 117, 119, during argument). It is submitted in Byles on Bills (20th ed. 186, n. (*m*)) that the distinction suggested in *Rolls* v. *Pearce* between an order and a bearer cheque cannot now be relied on as the death of the drawer is equally a revocation of authority to pay in either case and that the decision is questionable. But the argument in support of the decision does not depend on non-revocation of authority to pay, provided negotiation takes place in the donor's lifetime.

(*q*) *Rolls* v. *Pearce*, 5 Ch. D., p. 733.

There will be a good *donatio mortis causa* if the donor's cheque, after being negotiated, is presented and paid before the donor's death (*r*).

Stock and share certificates.

That there can be no *donatio* by delivery of receipts for South Sea annuities was decided in the old case of *Ward* v. *Turner* (*s*) whose authority has never been questioned. It was followed in *Re M'Wey* (*t*) where receipts issued by the Bank of England in respect of India Stock were held not to be a good subject of a *donatio mortis causa*. It was argued that they complied with the test adopted in *Re Dillon* (*u*), in that they contained on the face of them every particular in reference to the contract : the amount of money involved, the rate of interest, and the date of redemption. But the reply to this argument must be that that test of validity is not exhaustive and is qualified by the unimpugned authority of Lord Hardwicke. If *Ward* v. *Turner* were to be ignored then, in the words of Meredith, J., " much of the learning and of the subtle distinctions in the cases on *donationes mortis causa* must be regarded as obsolete " (*x*).

Delivery of certificates of railway stock was held to be insufficient in *Moore* v. *Moore* (*y*) as they were not substantially " distinguishable from South Sea annuities ". Hall, V.-C., declared, " notwithstanding that modern cases have gone very far beyond the earlier cases as to *donationes mortis causa*, that the law, if it is to be further extended, must be so extended by a higher tribunal " (*z*). The gift also failed because the requisite intention was lacking and it is worthy of note that the effect of neither the delivery of stock certificates nor of share certificates has been considered by the Court of Appeal.

Delivery of share certificates is not sufficient (*a*). *Re Weston*, the case in which this was decided, was a case favourable to the claimant because the shares were shares in a building society which could be withdrawn at any time on notice, the holder thereupon ceasing to be a holder or member; there was no need of transfer and assignment as in the case of ordinary shares. But Byrne, J., held that this was " not sufficient to differentiate " the case from *Moore* v. *Moore* (*y*). It had been argued on a former occasion,

(*r*) *Bouts* v. *Ellis* (1863), 17 Beav. 121; affirmed, 4 De G. M. & G. 249.
(*s*) (1752), 2 Ves. Sen. 431.
(*t*) [1928] Ir. R. 486.
(*u*) 44 Ch. D. 76, C. A., *supra*, p. 407.
(*x*) *Re M'Wey*, *op. cit.* 492.
(*y*) L. R. 18 Eq. 474.
(*z*) *Ibid.* 483.
(*a*) *Re Weston*, [1902] 1 Ch. 680.

in a case (*b*) decided on another ground, that a share certificate differed from the stock receipts in *Ward* v. *Turner* in that the latter were not documents of title of the stock itself, and that *Moore* v. *Moore* was inconsistent with the subsequent decision of the Court of Appeal in *Re Dillon* (*c*). In that case Cotton, L.J., in upholding a banker's deposit note as a good subject of a *donatio mortis causa*, acted on the principle that the note, besides acknowledging the receipt of the money, expressed the terms on which it was held and showed what the contract between the parties was. This principle, which has been applied in later cases to other documents than deposit notes, would cover a share certificate. Yet Byrne, J., in *Re Weston* (*a*) was content simply to follow *Moore* v. *Moore* (*y*).

The Court of Appeal is still free to draw a distinction between stock and shares with regard to a *donatio mortis causa* and to hold either or both to be a good subject of such a gift.

Other documents.

Delivery of the following will constitute a valid *donatio mortis causa* : mortgage deeds of real property (*d*); a policy of insurance on the life of the donor (*e*); a receipt for a loan containing the terms of the contract when delivery is to the debtor (*f*). There is a *dictum* of Romilly, M.R., in favour of (*g*) but an Irish decision (*h*) against an I.O.U. being a good subject of a *donatio mortis causa*. In that case Lord Ashbourne, C., distinguished an I.O.U. from the receipt in *Moore* v. *Darton* (*f*) by the fact that in *Moore* v. *Darton* " as the contract was created by writing, proof of the writing was essential to recovery upon the contract ". He thought that if the Court were to hold delivery of an I.O.U. sufficient it would be " hard to see how it could logically stop short of holding that the delivery of any symbol of indebtedness would make a valid *donatio mortis causa* " (*i*). Whatever other kind of delivery may be adequate in equity delivery of a symbol will not serve. But it is not easy to say what is and what is not a symbol.

(*b*) *Treasury Solicitor* v. *Lewis*, [1900] 2 Ch. 812.
(*c*) 44 Ch. D. 76, C. A., *supra*, p. 407.
(*d*) *Duffield* v. *Elwes* (1827), 1 Bligh (N.S.) 497, H. L.; *Re Patterson*, 10 L. T. 520; *Wilkes* v. *Alington*, [1931] 2 Ch. 104.
(*e*) *Witt* v. *Amis* (1861), 1 B. & S. 109 (common law); *Amis* v. *Witt* (1863), 33 Beav. 619 (Chancery).
(*f*) *Moore* v. *Darton* (1851), 4 De G. & Sm. 517.
(*g*) *Hewitt* v. *Kaye*, L. R. 6 Eq. 198, 200.
(*h*) *Duckworth* v. *Lee*, [1899] 1 Ir. R. 405.
(*i*) *Ibid.* 407.

THE LIBRARY.

Lewin on Trusts. Fourteenth edition. By R. I. Henty and J. P. L. Redfern, Barristers-at-Law Sweet & Maxwell, Ltd. 1939. 172 + 1031 pp. (£3 net.)

This is the Centenary edition of a very great work, since the first edition appeared in 1837 as "a comparatively slender volume of 696 pages". In the thirteenth edition it had grown to 1332 pages, and a number of defects, due mainly to the passage of time, were beginning to show themselves. For one thing, the editor of the thirteenth edition had an extremely difficult task. It appeared in 1928, and he was called upon rather quickly to superimpose the changes due to the property legislation of 1925 upon material which, in some places, had stood unaltered for nearly a century. In some places, too, new sections had grown up without overmuch regard for the plan of the original work. This was particularly marked in Part IV, which dealt with Trusts and Settlements of Land, and which essentially dealt with matters of conveyancing. In the present edition the whole of this part has been omitted, and the present reviewer is convinced that this is essentially the right policy. One other point which for some editions had been a rather unsatisfactory feature of Lewin was its treatment of Charitable Trusts. This important branch of the Law of Trusts was neither adequately treated nor left entirely alone. The material which appeared amounted to no more than notes on certain aspects of the Law of Charitable Trusts. In the present edition Chapter IX now gives a concise view of this branch of the law, covering forty-five pages. Once again, this is a substantial improvement.

One other general defect which gradually became apparent in the later editions was the lack of balance between the cases which were leading cases when Lewin wrote his treatise, or which he added in the editions which he edited, and cases which were decided at a later date. Usually the later cases were only briefly treated, and were referred to mainly in footnotes. An associated defect was that references to numerous older cases remained, even though they had ceased to be of material value or (in some cases) of any value at all. This necessarily implied that if Lewin was to survive a complete reconsideration of the text was required, and the editors would be called upon to undertake large-scale reconstruction. This is not merely a question of substituting later authorities for earlier ones. There has quite clearly been an important change in the conception of trusteeship during the last fifty years. When Lewin wrote, a trustee was essentially a person of standing, with leisure to devote himself to the administration of the trust in person, undertaking onerous duties involving him in a high degree of liability gratuitously. Since the Trustee Act of 1925, the trustee is regarded rather as a busy man of affairs, who supervises the activities of many professional agents, who are paid, and who can normally be relied on to discharge their duties competently and honestly. Accordingly, the liability of the trustee, as *Re Vickery*, [1931] 1 Ch. 572 shows, is to-day less strict than it was thirty years ago. Parallel with this change has

been the steady development of the conception of corporate trusteeship, which might, in the long run, replace that of the private trustee, acting gratuitously altogether. Obviously a very great step forward in this direction would have been taken if, in any future Trustee Act, trust corporations were to be given a statutory power to charge for their services. Many persons are of opinion that such a provision might well have appeared in the Trustee Act of 1925.

In the present edition, therefore, we should expect to find the changing conception of trusteeship clearly reflected, and this proves to be the case. This fourteenth edition is in fact a new departure, and it is gratifying to notice that it is over three hundred pages shorter than its predecessor. There is a limit for legal treatises, and the last edition of Lewin probably overstepped it. The present edition is altogether more manageable.

One of the branches of the Law of Trusts which is at once intricate and the subject of some conflict of opinion is that of Secret Trusts, and the learned editors have rewritten the section of Lewin which deals with it. This was inevitable, for the decision of the House of Lords in *Blackwell* v. *Blackwell*, [1929] A. C. 318, which cleared up a number of doubtful points, was given after the previous edition had appeared. Since that decision, the Court of Appeal has decided *Re Keen*, [1937] Ch. 236, a decision from which all sorts of erroneous conclusions have been deduced, in consequence of some rather unsatisfactory *dicta* in that case. The present reviewer entirely agrees with the limited view of the effect of that decision which the learned editors express, and he has elsewhere expressed his agreement with the views of Sir William Holdsworth, as expressed in 53 L. Q. R. 501. The *dicta* in *Re Keen*, as well as the opinions expressed in certain text-books, confuse two entirely separate doctrines—the doctrine of secret trusts, which is a principle of equity, and the doctrine of incorporation by reference, which is a rule of the Court of Probate. Sooner or later the House of Lords will have to clear up the muddle which has been permitted to arise in this class of case.

In its present form, Lewin is not only a first-class treatise, but also a very readable one, and it must be repeated that the present editors have so dealt with the text that the old and the new material are admirably balanced in a very good edition indeed.

G. W. KEETON.

The Law of Contract during and after War. By W. F. TROTTER, M.A., LL.D. Fourth edition. London: Butterworth & Co.; Edinburgh: William Hodge & Co., Ltd. 1940. 677 pp. (£2 12s. 6d.)

THIS work is unique in the matter of arrangement. Those familiar with the earlier editions will have known, more or less, what to expect in the matter of form. Part I consists of a Statement of the Law. This has to some extent been brought up to date, but unfortunately it has not been amplified materially except by the insertion of summaries or notes of the Emergency Acts. These summaries and notes have been well done and occupy upwards of sixty pages. The statement of the law appears to the reviewer to remain very much as it was in the third edition with an

occasional reference to the new legislation. The previous editions were undoubtedly useful; but a number of later decisions bearing upon the important question of frustration might well be added to the section dealing with the effect of war on contracts made with persons who are not alien enemies. This subject is relegated to § 20. Is it not deserving of pride of place? And should not the word "frustration" appear in the index?

Part II consists of leading British and American cases—some in full. These reports consist of no less than 300 pages. It is of course convenient to have full reports. Who does not, occasionally, when reading a text-book wonder what the facts were or what was actually said by the Court? It must be admitted that the usefulness of these reports would be much enhanced if references to them were to be found in Part I.

Part III consists of the Principal Statutes, Statutory Rules and Orders, and contains some 130 pages.

Then follow the Appendices. Of these there are no less than twenty (A to T). Here again there are practically no references to the body of the work, and it is as likely as not that a person reading of the "End of the War" on p. 663 would have no idea that "The Termination of War" was dealt with also on p. 204; and *vice versa*. Nor does the index link together these items, but gives War—"end of the war", 663—664, and (seven lines below) "termination of the war", 204.

Twenty Appendices, not cross-referenced, are a little beyond the proper ration. May one hope that this complaint of appendicitis will be eradicated in the next edition?

Laymen often complain that the terms used by English lawyers are difficult to follow; but what of Scots law? Professor Trotter, explaining the War Damage to Land (Scotland) Act, 1939, says, in the delightfully picturesque language of the Scottish law: "Where a decree of declarator of irritancy is pronounced, the recording of the extract of such decree in the appropriate register of sasines is to have the like effect and force as if the decree were one of declarator of irritancy *ob non solutem canonem*." What could be clearer than that? Perhaps, only one of our own Income Tax or Finance Acts, which are capable of producing considerable "irritancy"!

Lest these remarks may appear to belittle the value of Professor Trotter's book we hasten to say that our sole quarrel is with the arrangement of the work. Those who, like the present reviewer, are already familiar with the valuable earlier editions of this work (having once overcome the "irritancy" engendered by its unusual form) may be assured that they will find the material within its covers most useful and practical. Of an earlier edition of this work the *Scots Law Times* said: "An eminently practical and serviceable compendium." The *Daily Telegraph* also said: "Professor Trotter's book is a valuable addition to a branch of legal literature which needed supplementing, and should enjoy a large circulation. It is at once scholarly and practical."

In these observations we fully concur, and can testify to the usefulness and accuracy of the text. But, oh Professor Trotter—do please reduce those twenty Appendices!

Solicitors' Handbook of War Legislation. (First Supplement.) Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd.; Solicitors' Law Stationery Society, Ltd. xv and 129 pp. (7*s.* 6*d.* net.)

THE first Supplement of this work will be welcome to practitioners who are endeavouring to keep up to date with the emergency Acts and the orders and regulations made thereunder. The original "Handbook" has already proved its worth, and the present reviewer, for one, would not care to be without his copy and the "beneficial enjoyment" of the valuable notes which it contains.

This Supplement contains further notes upon the Acts which were printed in the original work. It also contains a very useful digest of the decisions under the Courts (Emergency Powers) Act, 1939, to date.

At p. 118 the authors suggest that the new Interest on Compensation (Defence) Order, 1940, which came into operation on February 1, 1940, is retrospective. This suggestion is not supported by section 38 (2) of the Interpretation Act, 1889, and runs counter to the normal rate which is opposed to a retrospective operation, particularly where the result would be to disturb vested and accrued rights. The old rate was 4 per cent., the new rate is 2 per cent. Where settlement of a claim has taken place on the footing that the interest payable up to, say, January 31, 1940, was at the rate of 4 per cent., are the authorities entitled to undo the settlement and claim a refund of one-half of the interest which they have paid over to the party entitled to it under the old order? Such a position might perhaps arise if it is competent to the appropriate authorities to make new orders operating retrospectively *and* in contradiction of an order previously in force. But is this so?

Have the authors considered the recent case of *National Real Estate, etc., Co., Ltd.* v. *Hassan,* [1939] 2 All E. R. 154 (C. A.), which seems worthy of mention in connection with cases where it is suggested that statutory provisions have a retrospective operation. Further, as Greer, L.J., said in *Ward* v. *British Oak Insurance Co., Ltd.*, [1932] 1 K. B., at p. 398, "there are numerous cases which clearly show that the Courts lean against so interpreting an Act as to deprive a party of an accrued right". Is there any authority for the view that orders made pursuant to statutes are to be interpreted differently? Perhaps the learned authors would consider whether an order made under the Compensation (Defence) Act, 1939, *can* revoke retrospectively an order previously made under that Act. Possibly there may be some authority on this question. The practice of making orders pursuant to Acts of Parliament is not new. May it not be the case that authority conferred by statute to make Orders in Council, and to revoke such Orders, only justifies the making of orders which have a prospective, and not a retrospective, effect. It would be well if the authors could make some further observations on this point in the next Supplement. It is one of practical importance.

It is sincerely hoped that the Supplements will be cumulative, and if thinner paper is obtainable it would perhaps assist in making this suggestion practicable.

E. O. WALFORD.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Restraint of trade—solicitor's articled clerk.—Dickson v. *Jones*, [1940] 3 All E. R. 182, is worthy of notice for its application of the general principles governing articles of clerkship. The case concerned solicitors, but it does not seem to be limited to the legal profession. The covenant was entered into to protect a solicitor in Stoke-on-Trent who articled a former unadmitted clerk who had been in his service for a number of years. The covenant restricted the clerk from practising during his life within a radius of fifteen miles. This area covered a number of places of which there was no evidence that the solicitor drew from them any number of clients. Farwell, J., held that the covenant was unenforceable as unreasonably wide for the protection of the solicitor. It is to be noted that the learned Judge would have hesitated to hold that the radius of fifteen miles was in itself too wide, but that coupled with the period of time, namely, the life of the clerk, it was unreasonable. This view was partly supported also by the fact that the clerk had lived all his life in Stoke. The learned Judge distinguished *Fitch* v. *Dewes*, [1921] 2 A. C. 158, on its facts.

The main lesson to be drawn from this decision is that every case of this description depends upon its peculiar facts. It is not possible to accept any precedent or precedents except for its general language. The onus is on the covenantee to show that the covenant is not unreasonable and, therefore, it is essential that care should be taken to avoid making the covenant too wide. It would appear to be safe to restrict any clerk from soliciting clients of the plaintiff who were clients during the period of service. It is also clear that it is not unreasonable to exclude a radius for a period, not unduly long, where it can be shown that the clerk might by his close association with the covenantee gain an unfair advantage in competition. Beyond this it is unsafe to go. In very specialised forms of work a more comprehensive covenant may be valid : see *Nordenfeldt* v. *Maxim-Nordenfeldt*, [1894] A. C. 535. In ordinary businesses and professions the ground of public policy, which supports these wide covenants, does not apply. It is to be remembered that it is better to get the limited protection from a narrow, even unduly narrow, covenant than to get no protection at all, if the covenant is too wide. Normally these

covenants in restraint of trade are not so drawn that the valid restrictions can be enforced and the invalid restrictions disregarded. If, however, there are special circumstances demanding severe restriction, the covenant should as far as possible be drawn so as to be severable.

Mines—subsidence—prescription or custom.—Newcastle-under-Lyme Borough Council v. *Wolstanton, Ltd.*, [1940] 3 All E. R. 190, requires only a short note by way of warning. The case was a short point of law whether the defence of prescription or custom could be pleaded in reply to a claim for damage by subsidence due to the working of mines. Farwell, J., held that he was bound by the decision in *Hilton* v. *Granville* (1844), 5 Q. B. 701, to hold that prescription or custom was not a good foundation to a claim to let down the surface. The decision on which he relied has been criticised, because it has since been held that there can be an express grant of the right to let down the surface. The case, however, has not been overruled and has been followed. The learned Judge, therefore, felt bound to follow it and relied upon the law as stated by Cockburn, C.J., in *Blackett* v. *Bradley* (1862), 1 B. & S. 940.

Solicitor's costs—charging order—property recovered or preserved.—Re Clayton, [1940] 3 All E. R. 233, was a short point of considerable importance to the profession. The solicitors concerned had acted throughout for the defendants, the personal representatives, in an administration action commenced by a second mortgagee in respect of a deceased's intestate estate. The deceased had died owning the equities of redemption in some fifty properties of which forty-nine were sold by the mortgagees without benefit to the estate. The other was sold by the personal representatives and a considerable balance was paid into Court. The solicitors asked that a charging order might be made under the Solicitors Act, 1932, s. 69, in respect of their costs, charges and expenses in respect of the administration. Morton, J., held, however, that though there were cases in which an order could be made covering all costs in the action (see *Re John Clayton, Ltd.* (1903), 92 L. T. 223; *Charlton* v. *Charlton* (1883), 52 L. J. Ch. 971; *Re Knight*, [1892] 2 Ch. 368) there was nothing to justify a departure from the practice of limiting the order to the costs incurred in recovering and preserving the property on which the costs were sought to be charged. The learned Judge, however,

pointed out that the note in the *Annual Practice*, 1940, p. 2371, that the power to make the order " is confined to the costs, charges and expenses incurred in respect of the particular property ' recovered or preserved ' " was too narrow. There were cases in which a more extended order might be made.

Easement of support — liability of municipal corporation demolishing buildings under statutory powers.—Bond v. *Norman. Bond* v. *Nottingham Corporation*, [1940] 2 All E. R. 12 (C. A.). It is well known that an owner of buildings which provide an easement of lateral support to other buildings on adjoining land cannot remove them so as to deprive his neighbour of the easement without providing adequate alternative support, subject to any agreement for compensation, though he may by allowing the buildings to fall into disrepair ultimately deprive his neighbour of the easement (*a*).

This case arose under the Housing Act, 1936. An order made under that Act for the demolition by the owner of buildings subject to an easement of support in favour of adjoining buildings had not been complied with, and the local authority was proceeding under its statutory powers to execute the demolition work itself. The question arose of whether the local authority so acting must respect the easement of support. If it were performing the demolition simply because the owner had failed to do so it would be in no better position than he; if its power under section 26 of the Act were construed as different from that of the owner, it might claim exemption from liability for damage inevitably caused in the exercise of a statutory power.

In the Court of Appeal Sir Wilfrid Greene, M.R., the watchful guardian of the subject against over-zealous local administration, refused to construe the authority's statutory power of demolition as permitting injury without compensation to private rights, unless the statute clearly indicated the contrary view. In favour of his construction is the fact that the Act provides for compensation for the extinguishment of easements when the local authority adopts, as it may do, the method of compulsory purchase in lieu of ordering demolition. Under both methods the Act makes provision for a hearing at which the property owner, though not the owner of an easement over it, may be heard in opposition. It was held that the local authority's duty was neither more nor less

(*a*) *Colebeck* v. *Girdlers' Co.* (1876), 1 Q. B. D. 234; *Jones* v. *Pritchard*, [1908] 1 Ch. 630.

than that of the owner who has failed to carry out the clearance order, and that the demolition could take place only subject to the provision of adequate alternative support to the adjoining buildings.

R. H. G.

Annuity given by will "free of all deductions"—whether subject to income tax—Public Trustee of will—Re Cowlishaw (*b*) *distinguished.—Re Wells, Public Trustee* v. *Wells*, [1940] 2 All E. R. 68 (Ch. D.). In this case Simonds, J., was called upon to determine whether an annuity given by will to the testator's wife "*to be paid free of all deductions*" meant free of all deductions as held by Bennett, J., in *Re Cowlishaw* (*b*), or whether the deduction of income tax was excepted from the expression. In deciding that the latter was the correct construction the learned Judge followed a long line of precedents, including an unreported Court of Appeal decision of 1920 (*c*). *Re Cowlishaw* was distinguished in the first place on the ground that a number of precedents had been cited to Mr. Justice Simonds of which Mr. Justice Bennett had not had the benefit; secondly, that as the law stood in 1917, when Wells had made his will, the Public Trustee's fee was in any case a deduction from the annuity (*d*), indicating that the expression in question was impliedly subject to the usual exceptions. The grounds of distinction will give less satisfaction than the fact of distinction itself to those who place the achievement of certainty high among the functions of precedent. It is probable that *Re Wells* will be followed in preference to *Re Cowlishaw*.

R. H. G.

Charities—gift of legacy and share of residue "for the benefit of the choir"—general charitable intent.—Re Royce, Turner v. *Wormald and Others*, [1940] 2 All E. R. 291 (Ch. D.). Among a number of other large charitable gifts a testator by his will gave "*To the vicar and churchwardens of Oakham Church for the benefit of the choir the sum of £1,000*", and one-fifth of his residuary estate for the same purposes. Simonds, J., was asked to determine the meaning and legal effect of the bequests. As to the meaning, he held that the expression "for the benefit of the choir" indicated the choir in an impersonal sense, *i.e.*, neither

(*b*) [1939] Ch. 654.
(*c*) *Re Shepherd.*
(*d*) So held in *Re Bentley*, [1914] 2 Ch. 456.

that part of the church which is known as the choir, nor those persons who for the time being comprise the choir, but "a gift for the advancement and improvement of the musical services in the church by means of a choir" (*e*). As to the validity of the gift, the learned Judge considered an unfavourable decision of Lord Chancellor Hardwicke (*f*), but refused to hold the gift invalid on an obsolete ground of the illegality of choirs in parish churches. The gift was valid and unquestionably charitable, "for it is a gift for the advancement of religion by a particular mode" (*g*).

The fact that this generous gift would clearly have been in excess of the needs of the indicated purpose raised the question of whether the *cy-près* doctrine would apply to the excess. To discover the pre-requisite of this doctrine, a general charitable intent, Simonds, J., very rightly refused to limit his consideration to the terms of the gift, and based his decision on the wider construction of the whole will. It is of interest to note the reasons which led him to adduce the requisite intent. (1) The gift of the share of residue was of an uncertain sum which would probably be very large, and even in the testator's contemplation in excess of the needs of the choir. (2) The fact that the gift was absolute, to the vicar and churchwardens, was an indication that the whole gift was to be employed for charitable purposes. (3) The underlying intent alone in a gift for church music is charitable, *i.e.*, the intent to advance religion through musical services, which offered a very acceptable general charitable intent. (4) The gift of residue was one of several charitable gifts to various objects, demonstrating in the testator a general charitable disposition.

The learned Judge accordingly directed the settlement of a scheme.

R. H. G.

Debenture stock purchased with proceeds of sale of settled land — whether movable or immovable — devolution on death.—Re Cutcliffe's Will Trusts, Brewer v. *Cutcliffe*, [1940] 2 All E. R. 297 (Ch. D.). International lawyers are warned to prepare themselves for strong reading in reports of this decision. It concerns the not unfamiliar conflict of claims of the heir-at-law and next-of-kin to land and stock taken as situated in England and forming part of the estate of a person dying domiciled in a foreign country. The problem arises from the principle which determines

(*e*) *Per* Simonds, J., at p. 294.
(*f*) *Att.-Gen.* v. *Whorwood* (1750), 1 Ves. Sen. 534.
(*g*) At p. 295.

the devolution on death of immovables by the law of their *situs* and of movables by the law of the intestate's domicil.

In *Re Cutcliffe* no difficulty was experienced in deciding that the nature of land comprised in an English settlement, the property being situated in England, must be determined by English law (*h*). Morton, J., accordingly decided that the settled land was an immovable and, as the testator died in 1897 domiciled in Ontario, must go to the heir-at-law, whatever the law of Ontario might have been at that date. Under the provisions of the Settled Land Act, 1882, part of the land had been sold and the proceeds invested in Caledonian Railway debenture stock which, at a date *subsequent to 1897*, when the testator died, became London, Midland and Scottish Railway debenture stock. The learned Judge determined the nature of this stock by English law, when at the material date its *situs* was clearly in Scotland. By Scots law the stock, though settled, would almost certainly have been classified as movable property.

However, treating the stock as having an English *situs* at the material date, Morton, J., held that it had the character of an immovable, and should, therefore, devolve with the land upon the heir-at-law. In reaching this startling conclusion the nature of the security, movable or immovable, upon which the debentures were charged was not considered, as the decision proceeded solely on a construction of section 22 (5) of the Settled Land Act, 1882, now substantially section 75 (5) of the 1925 Act. The section contains the words: "... securities on which an investment of capital moneys is made, shall, for all purposes of ... devolution, be considered as land. ..." No doubt in view of this statutory *tour de force* the learned Judge could reach no other conclusion than to treat the securities as land. That is a perfectly understandable fictitious classification of property for limited conveyancing purposes. But to classify them as immovable defies the real international distinction between the two kinds of property. As was said in *Re Berchtold* (*i*), "This equitable doctrine of conversion only arises and comes into play where the question for consideration arises as between real estate and personal estate. It has no relation to the question whether property is movable or immovable."

R. H. G.

Vendor and purchaser—action for specific performance—validity of notice of rescission of contract while action still on file.—Public

(*h*) Following *Re Berchtold*, [1923] 1 Ch. 192.
(*i*) *Supra, per* Russell, J., at pp. 205–6.

Trustee v. *Pearlberg*, [1940] 2 All E. R. 270 (C. A.). The appellant, Pearlberg, had agreed in January, 1932, to purchase certain land from one Greaves, paying the usual 10 per cent. deposit. The contract contained a term allowing the vendor to serve notice on the purchaser if the latter should have failed to comply with any condition of sale, and at the expiration of fourteen days from such notice, if the condition were then unperformed, the vendor should have the right to rescind and to forfeit the deposit. At the date for completion, when the conveyance had been engrossed, the purchaser asked for further time in which to find the purchase-money. As the purchaser failed to complete at the postponed date, the vendor issued a writ in November, 1932, claiming specific performance of the contract and damages in addition to, or in substitution for, specific performance. In July of the following year the purchaser entered an appearance, but no subsequent proceedings were taken in the action. In October, 1933, the vendor gave the purchaser notice of rescission of the contract and forfeiture of the deposit. The appeal arose out of a counterclaim by the purchaser for return of his deposit with interest against the Public Trustee as the vendor's executor.

In allowing the counterclaim for return of the deposit the Court of Appeal followed the line of earlier decisions, particularly relying on *Gray* v. *Fowler* (*k*), in which Bramwell, B., said, "... you cannot rescind a contract whilst you have a bill upon the file insisting upon it; you must first of all get rid of the bill" (*l*). The mere fact that the vendor did not prosecute his action could not, in the judgment of Goddard, L.J., be taken as an implied waiver of the right to insist on specific performance; nor, one may add, could the notice of rescission have that effect. The only effective waiver would be "if he abandons his action by discontinuing it in the manner provided by the rules of Court" (*m*). By commencing an action for specific performance, the Court is given the power of fixing the date for completion. The vendor's subsequent notice claiming to do so was therefore ineffectual, as also his attempt to treat the deposit as forfeited. Although the counterclaim for return of the deposit was successful, the Court rightly exercised its discretion under section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, in refusing to allow interest on the deposit to a purchaser who had been guilty of most unreasonable delays in completion and would have stood a poor

(*k*) (1871), L. R. 8 Exch. 249.
(*l*) *Id.*, at p. 268.
(*m*) [1940] 2 All E. R. at p. 283, *per* Goddard, L.J.

chance of recovering the money paid had his right to it been equitable instead of legal.

The Court dealt shortly with the claim on the vendor's writ for damages "in addition to, or in substitution for, specific performance", holding that these words did not allow the vendor to treat the contract as at an end, and that they were merely ancillary to the substantial claim for specific performance.

R. H. G.

Mortgage of land by a company—whether a debenture—validity of postponement of redemption for forty years—application of the rule against perpetuities.—Knightsbridge Estates Trust, Ltd. v. *Byrne and Others*, [1940] 2 All E. R. 401 (H. L.). This now familiar case has reached the House of Lords. To recapitulate shortly the facts : a large estate company mortgaged its land to an insurance company to secure a loan of £310,000. At the mortgagor's request a term was inserted providing for repayment of principal by eighty half-yearly instalments. The mortgagor later desired to redeem on giving six months' notice, and alleged that the postponement of redemption for forty years was a clog on the equity of redemption, and that the mortgage deed infringed the rule against perpetuities. These two questions of law were overshadowed by a third, namely, whether the mortgage was a debenture within the meaning of section 74 of the Companies Act, 1929, in view of the definition contained in section 380 of that Act.

Section 74 states : "A condition contained in any debentures . . . shall not be invalid by reason only that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding." The definition section, 380, does not specifically define a debenture, but reads : "'Debenture' includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not. . . ." The House decided that the mortgage in question came within the statutory description of certain kinds of debentures, and that section 74 therefore applied to render the postponement of redemption valid. The decision on this point will have caused surprise amongst company lawyers ; but as it has long been the practice of Judges, a practice followed in this decision by the House of Lords (*n*), to disclaim any ability to define a debenture, Lord Justice Romer's negative reasoning in

(*n*) See *dictum* of Romer, L.J., [1940] 2 All E. R., at p. 410 B.

favour of bringing ordinary mortgages of land within the definition will be accepted with better grace (*o*). But certain considerations to which the learned Lord Justice referred raised a suspicion in his mind that, "... when enacting section 74 of the Act, the Legislature had not ordinary mortgages of land in its contemplation". The rules of statutory interpretation are thus still far from maturity. Three outstanding differences in the nature of mortgages of land and company debentures never appear to have been considered. In the first place a mortgage is historically a much earlier and a much wider conception than a debenture. Mortgage established the *genus*, of which debenture is merely one *species*. Secondly, the usual form of debenture as understood by simple lawyers like the writer is a *contributory* loan to a company over the whole of the company's property, immovable and movable, fixed and floating. Thirdly (and this, it is submitted, is an important factor in classification), the terms of a mortgage proper are those fixed or permitted by the mortgagee, while the terms of a debenture are fixed by the borrowing company.

Having decided that the mortgage was a debenture, the House had no need to consider whether the provision postponing redemption was a clog on the equity of redemption, but it is important to note that Viscount Maugham expressly reserved full liberty "to consider that question if it should arise in a case where section 74 did not apply", and his judgment had been read with full agreement by Lord Atkin and Lord Wright. There were, however, certain subsidiary restrictions on the mortgagor's power of dealing with the land during the course of the mortgage. In upholding these terms the House stressed the important distinction to be made between the true freedom of contracting where big corporations entered into such transactions with the best legal advice, and the cases of impecunious private borrowers agreeing under economic pressure to any terms on which the mortgagee chose to insist (*p*).

On the second question of law raised by the mortgagor, the application of the rule against perpetuities, the House held that mortgages were outside the scope of the rule. The basic assumption on which mortgages had been considered outside the rule was the invalidity in equity of postponing the date of redemption for longer than twenty-one years. But the House did not accept this basis, treating mortgages before 1926 as a true exception to

(*o*) "I can find no legitimate reason for not attributing to the word 'debentures' in section 74 the meaning given to it by section 380": *id.*, *per* Romer, L.J., at p. 411.

(*p*) At pp. 407 and 409, *per* Viscount Maugham.

the perpetuity rule and those made after 1925, by demise or subdemise, as not of a character to require exception from it (*q*).

R. H. G.

Emergency legislation — lessor's judgment against sub-lessee when underlease mortgaged—application of sub-lessee's income—meaning of Courts (Emergency Powers) Act, 1939, s. 1 (4).—*Brandon* v. *Reidy*, [1940] 2 All E. R. 474 (C. A.). Before the outbreak of war the defendant, a young surgeon, took a sub-lease of a house in Harley Street at a rent of £500 per annum, and arranged a mortgage with collateral life policy to secure a loan of £4,000 from an insurance company, this sum being spent on improvements to the demised premises. Due to the war many of the sub-tenants of the house left their consulting rooms, and the sub-lessee himself took a commission. The rent of the head lease amounted to £350 per annum, and the total available income of the sub-lessee was £340 per annum.

The Court decided two questions. Firstly, section 1 (4) of the Courts (Emergency Powers) Act, 1939, allows the Court to grant relief to a person liable to satisfy an obligation if he is "unable *immediately* to do so" by reason of circumstances due to the war. It was argued without success that the effect of the word "immediately" was to limit the Court's power to grant relief to those cases in which, though there was no present ability to perform the obligation, there was a future prospect of so doing. The Court refused to take this narrow view, which "would very seriously circumscribe the beneficial object which the Act has in mind" (*r*), holding that it was not incumbent upon the debtor "to show that at any particular time, or, indeed, at any time, he will be able to pay" (*s*).

The second question dealt with the distribution of the defendant's income between the landlord and the mortgagees. As the latter were not represented in the action the Court felt itself unable to consider their rights, and gave judgment applying the whole income towards payment of rent. This, as the Court recognised, was a case in which a third party was vitally interested in the allocation of income, and thought that the attention of the rule-making authority should be called to the case. Where the whole principle of the Courts (Emergency Powers) Act, 1939, is

(*q*) *Per* Viscount Maugham, at p. 408 F.
(*r*) *Per* Goddard, L.J., at p. 477.
(*s*) *Id., loc. cit.*

to give Courts a discretion in the enforcement of obligations, it would seem almost superfluous to add that such discretion must be exercised on equitable principles, one of which is that of equality.

R. H. G.

Foreclosure—practice—vesting order where mortgagor fails to execute conveyance.—Jones v. *Davies*, [1940] W. N. 174, turns simply on a point of practice not likely to occur frequently. The defendant had deposited title deeds as a security for a loan and had failed to repay it. The mortgagee obtained an order for foreclosure absolute and tendered a conveyance to the mortgagor together with service of the copy of the order, but the defendant failed to execute the conveyance. More than twenty-eight days after the application to the mortgagor for execution by him of the conveyance (see *Re Knox*, [1895] 1 Ch. 483) the mortgagee applied to the Court for a vesting order under the Trustee Act, 1925, s. 44 (vi), on the ground that the mortgagor had wilfully refused or neglected to convey. The substantive point was whether the mortgagor was in the circumstances a trustee for the purposes of the Trustee Act. Morton, J., held that the facts of the present case were analogous to those of *Re Crowe* (1871), L. R. 13 Eq. 26, and that the order might be made. In *Re Crowe* (*supra*) the mortgagor had covenanted to surrender copyholds to his mortgagee and had neglected to do so, and Romilly, M.R., had held that in the circumstances he was a trustee for the purposes of the then relevant Trustee Act.

The purpose of the application was to avoid the otherwise cumbersome method of applying to the Court for the appointment of a third party to convey, which would necessitate the approval of the conveyance and a four-day order. The decision is one essentially affecting practice rather than substantive law. A mortgagor is not generally a trustee for the mortgagee and it cannot be said on the basis of this decision that a mortgagor would be treated, even in these circumstances, as in every way a trustee for the purposes of the Trustee Act, 1925. Such an application should not normally arise because where there is a memorandum of deposit of title deeds this memorandum is for many reasons more satisfactory if it is under seal, and contains an irrevocable power of attorney in favour of the mortgagee to deal with the legal estate.

Power of appointment—meaning of "after any marriage"—Re Rantzen's Settlement, Rantzen v. *Rantzen and Ingram,* [1940] 1 Ch. 243.—Under a settlement a settlor was given a power to appoint the settled funds "either in contemplation of or after any marriage of the settlor . . . for the benefit of the settlor and any wife of his and his children or remoter issue".

The settlor married. There was one child of the marriage who died aged two years. The wife died shortly afterwards, and the settlor then for the first time executed a deed of appointment of the whole settled funds, giving himself a life interest. Upon a summons asking the Court to construe the expression "after any marriage", Morton, J., held that a valid appointment could be made at any time after the celebration of the marriage; even after the death of the wife and issue when the marriage had come to a complete end. It is submitted that this construction is unduly wide, as the whole expression "either in contemplation of or after any marriage" seems to indicate the exercise of the power in relation to a specific marriage, and should not, therefore, be extended beyond the duration of that marriage.

R. H. G.

Mortgages—effect of mistake as between first and second mortgagees—duty of mortgagee towards subsequent mortgagees—Weld Blundell and Others v. *Synott,* [1940] 2 All E. R. 580 (K. B. D.). Plaintiffs and defendant were respectively first and second mortgagees of certain land. The plaintiffs had properly exercised their power of sale, but due to a miscalculation of their accountants had remitted to the defendant a larger sum, as balance of proceeds of sale, than was due to him. Against the claim to recover the over-payment the defendant contended that the mistake was purely between the plaintiffs and the mortgagor and therefore could not be made a basis of recovery of money from him. Asquith, J., found that in cases of this kind what the first mortgagee owed to the second depended on what the mortgagor owed to the first mortgagee, and held that because a question of account arose between the first mortgagee and one of these parties it did not imply that such account would not concern the mortgagee in relation to the other party. The principle that money paid under mistake in cases where, had the mistake been true, there would have been a legal obligation to pay it, was approved as a general test of whether the mistake was between

those parties (*a*). The defendant's second defence, that of estoppel on the ground of the plaintiffs' mistake inducing him to increase his bank overdraft, failed on the learned Judge's holding that, even had the mistake amounted to a sufficient misrepresentation, no estoppel could arise unless the statement had resulted from the plaintiffs' neglect or misconduct. This raised the interesting question of the position of a first mortgagee with proceeds of sale in his hands to which a second mortgagee is entitled. His duty, asserted Asquith, J., is "to hold the balance of the proceeds, after satisfying his own debt, in trust for (subsequent) incumbrancers", but it does not exceed the duty of an ordinary trustee or impose upon him that of correctly informing at his peril the second mortgagee of the true state of the account. An ordinary trustee could certainly reclaim an overpayment honestly made (*b*), but not a trustee who was also a beneficiary (*c*). It would be a superficial error to consider a first mortgagee as a trustee-beneficiary. He is only a trustee of the balance of proceeds after paying himself, and in such balance has no beneficial interest at all. One can therefore respectfully approve the judgment in this case in favour of the plaintiffs.

R. H. G.

Emergency legislation — mortgage — mortgagor's consent to appointment of receiver—effect of failure to obtain leave of Court under the Courts (Emergency Powers) Act, 1939, s. 1 (2).—Soho Square Syndicate, Ltd., and Another v. *E. Pollard & Co., Ltd., and Another*, [1940] 2 All E. R. 601 (Ch. D.). Unaware of his rights under the Courts (Emergency Powers) Act, 1939, a mortgagor had consented to the appointment of a receiver by the mortgagee. Upon becoming aware of such consent the first plaintiffs, a syndicate of whose property the mortgagor was trustee, brought this action for a declaration that the appointment of the receiver was void and an injunction to restrain the receiver from continuing to act.

The stimulating judgment of Farwell, J., granting the required declaration and injunction, will be warmly received by those who see, or hope to see, in the judicial interpretation of statutes something more than a slavish adherence to precedent and syntax. The relevant section 1 (2) of the Courts (Emergency Powers) Act, 1939, prohibits the appointment of a receiver of any property

(*a*) "When a mistake is one affecting obligation, I think that it is between the parties", *per* Asquith, J., at p. 584, considering *Aiken* v. *Short* (1856), 1 H. & N. 210 and other cases.

(*b*) *Re Ainsworth*, [1915] 2 Ch. 96; *Re Musgrave*, [1916] 2 Ch. 417.

(*c*) *Re Reading*, [1916] W. N. 262.

without leave of the appropriate Court. Three decisions (*d*) upon a similar provision of the Courts (Emergency Powers) Acts, 1914 and 1916, all permitting the contracting out of those Acts, were cited to the learned Judge. He refused to follow them, partly on the ground that the relevant point was not argued, but chiefly on the broader basis of public policy. Though there is no provision in the 1939 Act to prohibit contracting out of its terms, the test of whether such contracting out is possible is the nature of the Act itself—whether it deals only with private rights or is of a more public nature. Contrasted with the 1914—1916 Acts, the new Act is based on a very different conception of the social interest in the enforcement of remedies against a mortgagor. The vast extension of borrowing for house purchase since the last war, particularly through the building society movement, has resulted in a deeper realisation of the State's concern in the prevention of hardship to mortgagors, particularly at times like the present. Farwell, J., therefore held that nothing short of an application for the leave of the Court could validate the appointment of a receiver. R. H. G.

Legacy to fund—administration in discretion of committee—validity on grounds of certainty—application of rule against perpetuities—Re Taylor, Midland Bank Executor and Trustee Co., Ltd. v. *Smith and Others*, [1940] 2 All E. R. 637 (Ch. D.). A testator had left part of his residuary estate to the trustees of a fund which he had established during his lifetime for the benefit, in various ways, charitable and non-charitable, of "past and present members of the staff of the Midland Bank". The uncertainty of this vague class of beneficiaries was not held to invalidate the gift, as, in Farwell, J.'s judgment, there was no uncertainty as to the person to whom the gift should be paid—"... it is a gift to a fund, the hand to receive the money being the trustees of that fund" (*e*).

The question of whether the gift offended the perpetuity rule was quickly answered in the negative. Following the well-known case of *Re Clarke* (*f*), the learned Judge held that there could be no tendency towards a perpetuity in a gift such as that before him when the committee of management of the fund could under its

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(*d*) *Re Sandow, Ltd.*, [1916] W. N. 262. The other decisions of P. O. Lawrence and Atkin, JJ., are not referred to by name in the only report at present available.

(*e*) *Per* Farwell, J., at p. 640, following *Cocks* v. *Manners* (1871), L. R. 12 Eq. 574.

(*f*) [1901] 2 Ch. 110.

constitution at any time put an end to the fund by a distribution of the whole capital among the beneficiaries.

Farwell, J., remarked, " . . . it appears to me that the fact that there may be some difficulty in construing the exact meaning of the rules of such an association is not a matter which can affect the validity or otherwise of the gift itself " (*g*). But the uncertainty of the beneficial objects of the fund, as compared with those in the leading case of *Cocks* v. *Manners* (*h*), the sisters of a specific Roman Catholic convent, raises doubts in one's mind as to whether the justice of the learned Judge's decision on this point did not outweigh the law. R. H. G.

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2. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Housing Act, 1936, s. 2—" rent not exceeding £40 ".—The decision of Atkinson, J., in *Rousou* v. *Photi*, [1940] 1 K. B. 299; 56 T. L. R. 237; noted in *The Conveyancer*, Vol. 4, p. 222, has now been reversed by the Court of Appeal, with important consequences in the law of landlord and tenant : *Rousou* v. *Photi* (1940), 56 T. L. R. 685.

By section 2 of the Housing Act, 1936, there is to be implied in every contract for letting a house for human habitation at a rent not exceeding £40 a year in the county of London and £26 elsewhere, notwithstanding any stipulation to the contrary, a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation. The section provides for certain exceptions which are of limited interest only.

The view generally taken of this section was previously that by " rent " was meant rent exclusive of rates, so that if by the terms of the tenancy a rent was paid inclusive of rates, an amount equal to the rates discharged by the landlord had to be deducted from the contractual rent in order to arrive at the true " rent " within the meaning of the section. This was the view taken by the Court in *Jones* v. *Nelson*, [1938] 2 All E. R. 171, cited in Woodfall (24th edition) at p. 717, and by Atkinson, J., in *Rousou* v. *Photi*, *supra*. But the Court of Appeal has now rejected this view and

(*g*) At p. 642.
(*h*) *Supra*, note (*e*).

has held that "rent" in this section of the Housing Act means the annual contractual rate agreed to be paid by the tenant, whether inclusive of rates or not (56 T. L. R. 685). Sir Wilfrid Greene, M.R., in a judgment assented to by the remainder of the Court, expresses his construction of the section in these words: "The section requires the existence of a contract. The rent referred to in the section appears to me to mean, and to mean only, the rent payable by virtue of that contract by the tenant to the landlord. I can see no justification for dissecting that contractual payment and attributing part of it to something which is called the annual value of the house, or of part of the house, and attributing the rest of it to rates or an apportioned sum in respect of rates. It seems to me that the Legislature has taken, for reasons no doubt thought good by it, a simple and clear test about which nobody could be confused—namely, the actual contractual rent paid by the tenant to the landlord."

It is thought that this construction attaches a proper weight to the words "in any contract . . . at a rent". The Courts have hitherto been reluctant to find that those words refer to the rent actually stated in the contract, and nothing else. Attention has been drawn to anomalies which may in some cases result from such a construction. In a border-line case a house may be within or without the section according to whether the landlord stipulates for a rent exclusive or inclusive of rates. But this is less of an anomaly than the consequence which might occasionally have followed from the construction previously adopted, and now rejected by the Court of Appeal, whereby in some cases a house might have been outside the section one year and within the section the following year under the same contract of tenancy, merely because an increase in the amount of the rates payable by the landlord had reduced that portion of the rent which was not attributable to rates below the figure of £40 per annum. It is thought therefore that the construction adopted by the Court of Appeal actually works out more logically, and produces less anomaly, in practice.

A further point of interest arose in *Rousou* v. *Photi* though in view of the decision of the Court of Appeal on the point mentioned above it did not actually fall to be decided. It was contended on behalf of the landlord that the section does not apply at all to houses which are let at something other than an annual rent. The Court of Appeal did not, however, accede to this view, and it was pointed out by Sir Wilfrid Greene, M.R., that if it were accepted the section would fail to give protection to a vast number of persons for whom its protection was eminently desirable. Perhaps this observation so expressed may be criticised as being not strictly

relevant to the construction of the statute, but the meaning of the learned Master of the Rolls is clear, that the section when read as a whole and with the remainder of that part of the Act is evidently intended to apply to weekly tenants. Curiously enough the section merely says "a rent not exceeding . . . forty pounds", without mentioning the period with reference to which the rent is to be calculated. But the heading to this group of sections is "Obligation of Lessors of Small Houses", and this may be referred where a difficulty of construction arises, as being in the nature of a preamble to those sections: see *Martins* v. *Fowler*, [1926] A. C. 746, P. C. A small house let at £40 must mean let at £40 by the year. Taking all these considerations into account, it is suggested that the section really means to say "at a rent not exceeding . . . *the rate of* forty pounds *by the year*".

This still leaves the question whether, in view of the fact that a house let on a weekly tenancy may stand unoccupied for some part of the year, some multiplier other than 52 should be employed in order to translate the weekly rent into the terms of an annual rent. Scott, L.J., referred to the analogy of rating practice, as explained in *Ryde on Rating* (6th edition) at p. 198 (erroneously printed as p. 108 in 56 T. L. R., at p. 687). It is thought, however, that this analogy is not really applicable. In rating practice what has to be determined is the net annual value, not the rent which the occupier actually pays. Such rent is only evidence as to what is the net annual value, and clearly some figure less than 52 may be the correct multiplier. But under the Housing Act, 1936, s. 2, we are concerned with the rent at which the house is let *in the contract*, measured in terms of the yearly rent, and it is thought that, by the same reasoning which led the Court of Appeal to reject the deduction from the contractual rent of the rates paid by the landlord, the rent referred to by the section is the actual rent being paid by the tenant under the contract, and that this, if measured by the week, should be multiplied by 52 in order to arrive at the figure of the rent by the year for the purposes of the section. However, this question, although discussed in *Rousou* v. *Photi*, was expressly left open by the Court of Appeal in that case.

Tenant's fixtures—object and purpose of annexation—removable iron shed on concrete floor—petrol pumps.—Two recent cases reported in [1940] 1 All E. R. provide illustrations of the law governing the removability of tenant's fixtures.

In *Webb* v. *Bevis*, [1940] 1 All E. R. 247, a decision of the Court of Appeal, the structure in question was a corrugated iron

shed laid upon a concrete floor. The roof rested on timber posts, which rested on the concrete floor. These posts were bolted to iron straps which were fixed in and protruded from the floor. The whole superstructure of the shed could be removed in sections. It was held that the superstructure and the concrete floor were to be regarded as separate units and that the superstructure was removable as a tenant's fixture. The case was distinguished from *Pole-Carew* v. *Western Counties and General Manure Co.*, [1920] 2 Ch. 97, where that portion of the erection which was physically capable of removal was in fact an integral part of one composite building, namely a sulphuric acid plant, part of which was embedded in the land by foundations; it followed that no part of the building was removable as a tenant's fixture. In *Webb* v. *Bevis*, on the other hand, the floor was not an integral part of the shed, but merely the flat, rigid and unbreakable surface upon which the shed was erected. Regarding the superstructure as a separate entity from the concrete floor, it was clear that the object and purpose of its annexation was that it should be used by the tenants for the purposes of their trade for such time as they might need it, and should then be unbolted, taken to pieces and re-erected elsewhere. In these circumstances the superstructure was removable as a tenant's fixture.

Smith v. *City Petroleum Co.*, [1940] 1 All E. R. 260, was an Assize Court decision of Stable, J., as to the removability of petrol pumps affixed to tanks embedded in the ground. It was held that the pumping apparatus was to be regarded as a separate entity, although bolted to and of no use except in connection with a tank underneath. As a separate entity, it is removable as a tenant's fixture.

Both these cases should be noted in connection with the authorities cited at pp. 751 and 752 in *Woodfall* (24th edition).

Smith v. *City Petroleum Co.* also illustrates the rule that if a tenant wishes to remove his tenant's fixtures he must do so during his term or, if his tenancy is determinable at shorter notice than is a reasonable time for removing the fixtures, within a reasonable time after determination of his tenancy.

Rent Restrictions Acts—recontrol by failure to register under section 2 of Act of 1933 not affected by Act of 1939.—Tibber v. *Upcott*, [1940] 1 K. B. 618, although accorded the distinction of a report in the Law Reports, merits only brief mention. The Act of 1933 provides, by section 2 (2), that if in any proceedings it is proved that a dwelling-house would have been controlled but for section 2 of the Act of 1923 (relating to decontrol by actual

possession) and no application for registration has been made as provided and within the time limited by section 2 of the Act of 1933, the dwelling-house shall be deemed to be controlled. Section 2 of the Act of 1933 has been repealed by the Act of 1939. It was argued in *Tibber* v. *Upcott* that the recontrol brought about by failure to register was only operative so far as any proceedings were concerned, that the section was therefore only procedural, and the tenant acquired no vested rights under the section which could, by virtue of section 38 of the Interpretation Act, 1889, survive the repeal of the section. The Court of Appeal rejected this contention and held that under section 2 of the Act of 1933 the tenant acquired vested rights in respect of the control of the house under the Rent Acts which survived the repeal of the section giving rise to them.

Civil Defence Act, 1939—" Commercial building ".—The Civil Defence Act, 1939, imposes upon the owner of " a commercial building " certain obligations as to the provision of air-raid shelter, and " commercial building " is defined by section 89 (5) as being, with certain specified exceptions, " a building in which more than fifty persons work ". In *Goodchild* v. *Romford Borough Council* (1940), 56 T. L. R. 548, it was held that a block of thirty shops in an arcade was not " a building " and therefore not a commercial building within the Act (see *Woodfall* (24th ed.), Supplement No. 1, p. 34).

Liabilities of landlord and tenant in respect of non-repair and dangerous premises.—An article on this subject, with special reference to *Wringe* v. *Cohen*, [1940] 1 K. B. 229, has owing to lack of space unavoidably been left over for inclusion in the next volume.

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3. *WILL CASES.*

By S. J. Bailey, LL.M., Barrister-at-Law.

Apportionment—rule in Howe *v.* Lord Dartmouth—*unauthorised investments comprised in settled residuary gift—payments to life tenant—Apportionments Act, 1870.*—Several points of practical importance concerning the rule in *Howe* v. *Lord Dartmouth* (1802), 7 Ves. 137, have been raised and decided in *Re Fawcett, Public Trustee* v. *Dugdale*, [1940] 1 Ch. 402. The testatrix had bequeathed her residuary estate to trustees upon trust to pay certain pecuniary legacies and to invest the balance of the estate, the income therefrom to be divided among certain persons for

their respective lives with remainders over to their children. The residue comprised several investments which, not being authorised by law for the investment of trust funds, were wasting and hazardous within the meaning of the rule in *Howe* v. *Dartmouth*. Strictly speaking, that rule is two-fold : (i) it raises an implied trust to convert the unauthorised investments, and (ii) it fixes the amount of income to be paid to the life-tenant whilst such investments are retained. When the will itself directs a conversion into authorised investments, it is hardly accurate to state that the rule in *Howe* v. *Dartmouth* applies; for, although the slightly earlier decision in *Gibson* v. *Bott* (1802), 7 Ves. 89, provides a similar result as to the amount of income to be paid to the life-tenant in such a case, the duty to convert arises not from the nature of the investments but from the words of the will. In *Re Fawcett*, *supra*, Farwell, J., appears to have held that the words of the will themselves raised an implied trust to convert any unauthorised investments; for the will contained an express trust to invest, " and that must mean to invest in trustee securities " (p. 406). On the facts, therefore, this case was on the border line between *Howe* v. *Dartmouth* and *Gibson* v. *Bott*; but this is perhaps a point of merely academic interest, since on either view the rules as to adjusting the life-tenant's income appear to be the same; and in holding that such adjustments must be made in this particular case, the learned Judge said that this was in accordance with *Howe* v. *Dartmouth*. He pointed out, however, that had there been an express power to postpone conversion his judgment might have been different. It will be remembered that such a power to postpone has sometimes been held to give existing holdings the character of authorised investments, thus enabling the life-tenant to claim the whole of the net income derived from them.

Having held that the income of the non-trustee investments should be adjusted in accordance with *Howe* v. *Dartmouth*, the learned Judge then proceeded to answer a number of consequential questions raised by the summons. From his judgment it would appear that the following procedure should ordinarily be adopted when income is being adjusted in accordance with either *Howe* v. *Dartmouth* or *Gibson* v. *Bott*. (a) As regards unauthorised investments sold during the executor's year, the life-tenant is entitled to be paid interest at the rate of 4 per cent. per annum on the net proceeds of any such sale, in respect of the period between the date of the testator's death and the date of completion of the sale in question. (b) (i) At the end of a year from the testator's death, any unauthorised investments still in hand should be valued as at that date, and on the capital value so ascertained 4 per cent. per

annum should be paid to the life-tenant as from the date of the death until the investments in question are ultimately realised. It will be observed that the learned Judge preferred to fix the figure at 4 per cent., and declined to hold that it should vary with the price of consols. (ii) For the purposes of (i), above, the unauthorised investments for the time being are aggregated, the 4 per cent. being payable on their aggregate value, as was decided in *Re Owen*, [1912] 1 Ch. 519. (iii) The life-tenant's 4 per cent. is payable primarily out of such income as is actually received from the unauthorised investments during the year concerned, and for this purpose the Apportionments Act, 1870, ought *not* to be applied in the income accounts either at the testator's death or at the beginning or end of any accounting period. (iv) If the income actually received during any accounting period is more than sufficient, the surplus should be invested in authorised investments and the income from such investments will thereafter be payable to the life-tenant. (v) In so far as the income actually received from the unauthorised investments during any accounting period is *not* sufficient to produce the life-tenant's 4 per cent., he is entitled to be paid out of the ultimate proceeds of sale when the unauthorised investments are realised, the deficit to be thus refunded being calculated at 4 per cent. simple interest less tax; alternatively it appears to be permissible to refund any such deficit out of the excess income of any subsequent year, though the judgment is not altogether clear perhaps on this point. (vi) The life-tenant, however, in respect of any arrears of income thus due to him, has no right against surplus income of *previous* years nor against the proceeds of any unauthorised investments which were realised *before* the arrears arose; surplus income and proceeds of realisation must be invested in authorised investments and are thus purely capital, except in so far as payments of interest to the life-tenant are already in arrear.

Conflict of laws—investments of capital money under Settled Land Acts—whether situate in England—whether "movables" or "immovables".—By virtue of section 22 (5) of the Settled Land Act, 1882, as under section 75 (5) of the Settled Land Act, 1925, capital money arising under the Act and any investments thereof are to be considered as land "for all purposes of disposition, transmission and devolution". Accordingly, such money or investments arising under a strict settlement of freehold land must ordinarily be regarded as real property. This was decided in *Re Cartwright*, [1939] Ch. 90 (noted *ante*, vol. 3, pp. 202, 224), where the Court of Appeal held that such investments are not "personal

estate " within the meaning of the Wills Act, 1861. Morton, J., following that decision, has now held in *Re Cutcliffe's Will Trusts*, *Brewer* v. *Cutcliffe*, [1940] 1 Ch. 565, that such investments are " immovables ". The question before him involved a settlement of English freeholds, made in England by the will of a testatrix who died in England in 1884. Under this settlement, N. (her nephew) became entitled to a vested interest in remainder. In 1897, N. died intestate, domiciled in Ontario, Canada; and at that time the settled property included certain English stock, representing part of the proceeds of sale of some of the land formerly comprised in the settlement. Morton, J., held that the stock was an immovable, and consequently devolved under the law of England (the *lex situs*) as real property to N.'s heir-at-law. The first point decided was that the stock, being stock of a British company held by trustees resident in England as capital money of a settlement of land in England made by an English testatrix, was situate in England. Accordingly, English law was the *lex situs* by which one decides whether the stock was a movable or an immovable in 1897. On applying the English law, the Settled Land Act, 1882, s. 22 (5), shows that " for all purposes of disposition, transmission and devolution " the stock was in 1897 considered as " land "—*i.e.*, as an immovable. Although Russell, J., in *Re Berchtold*, [1923] 1 Ch. 192, held that the equitable doctrine of conversion does not notionally convert into a " movable " land held upon trust for sale, the equitable doctrine being in his view restricted to the question whether property is real or personal, it is quite clear that the terms of section 22 (5) of the Settled Land Act, 1882 (and of section 75 (5) of the Act of 1925) are not so restricted.

Construction—forfeiture clauses—forfeiture dependent upon a state of mind—uncertainty.—Much litigation has been caused by clauses for forfeiture attached to devises and bequests of property; and in recent times attention has been directed particularly to the fact that a forfeiture clause, unless drafted with extreme care and particularity, may be held void for uncertainty. The principle in such cases was enunciated by Lord Cranworth in *Clavering* v. *Ellison* (1859), 7 H. L. C. 707, a case concerning forfeiture should the donees " be educated abroad or not in the Protestant religion according to the rites of the Church of England ". He said, at p. 725 : " I consider that, from the earliest times, one of the cardinal rules on the subject has been this : that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the

happening of what event it was that the preceding vested estate was to determine." This *dictum* has been frequently followed—*e.g.*, by the Privy Council in *Sifton* v. *Sifton*, [1938] A. C. 656, where a condition subsequent to operate if the donee should cease to "reside in Canada" was held void for uncertainty.

The latest decisions on the point are *Re Blaiberg, Blaiberg and Public Trustee* v. *De Andia Yrarrazaval and Blaiberg*, [1940] 1 Ch. 385, and *Re Evans, Hewitt* v. *Edwards*, [1940] W. N. 162. The report of *Re Blaiberg* shows that the will and codicils there concerned had been before Farwell, J., in 1938, an unreported decision, and that he had then held void for uncertainty (and for perpetuity) a forfeiture clause contained in the fourth codicil as regards donees "who shall cease or fail to profess or intermarry with any person who shall not profess the Jewish faith". Thereafter the present summons was issued to determine whether a forfeiture clause contained in the second codicil was void for uncertainty. This clause provided that "should any child or grandchild of mine at any time whether before or after my decease marry any person not of the Jewish faith, such child or grandchild shall forfeit and be deprived of any interest or share under my said will or codicil thereto". Morton, J., held the clause void for uncertainty in view of the uncertainty of the meaning and application of the words "*of* the Jewish faith", and in the course of his decision quoted liberally from the above-mentioned judgment of Farwell, J. The judgment of Farwell, J., had concentrated upon the words "cease or fail to profess", which, as he pointed out, are capable of several meanings. He had found (i) that it was uncertain whether a person who outwardly professes the Jewish faith, without in fact holding it, was intended to incur a forfeiture, and (ii) that if forfeiture was intended by the testator in such a case, it is impossible for the Court to ascertain with certainty whether in fact such a person in his own mind holds a particular religious belief. This illustrates a *dictum* of Fry, J., in *Re Viscount Exmouth* (1883), 23 Ch. D. 158, at p. 164, to the effect that in a condition subsequent there must be both (i) certainty of expression in the creation of the limitation, and (ii) certainty in its operation. In relation to the words "*of* the Jewish faith", Morton, J., found the same two difficulties as Farwell, J., had found in the word "profess": (i) it was not clear whether to be "of the Jewish faith" was intended to signify to hold in one's own conscience the beliefs which constitute the Jewish faith; and (ii) if this was the intention, it is impossible for the Court to ascertain with certainty whether a particular person holds a particular belief.

It thus follows that a condition subsequent, intended to turn upon the beliefs held by a donee or other person, will be void for uncertainty unless its intended operation is clearly confined to some external signs of such belief. An illustration of this is *Re Evans* (*supra*), a later decision by Farwell, J. There the will directed a forfeiture as regards "any child or grandchild of mine who may at any time become a convert to the Roman Catholic religion". After the date of the will, but before the testator's death, his daughter and a grand-daughter were baptised according to the rites of the Roman Catholic Church. Farwell, J., held that the forfeiture clause was valid. Since, however, the clause further directed that, on becoming such a convert, such child or grandchild should "*ipso facto*" forfeit any rights under the will, this was taken to indicate that no forfeiture was intended unless, at the time of becoming a convert, some right which could be forfeited had already arisen under the testator's will: hence it could not apply to the daughter and grand-daughter who had become converts before the will came into operation. In holding that this forfeiture clause was not void for uncertainty, the learned Judge said that the case was not comparable with *Re Blaiberg* (*supra*); for there the forfeiture clause had contemplated a state of mind, which is something the Court cannot ascertain with any certainty, whereas on becoming a convert to the Roman Catholic religion one is baptised into the Roman Catholic Church—an act which can be ascertained with certainty. Nevertheless, despite this decision, it seems doubtful whether a clause for forfeiture on becoming a "convert" to some particular religion is entirely satisfactory. It would seem to be open to a Court of construction to hold that the term "convert" may include a person who, without any outward ceremonies, adopts in his own mind the particular religious belief; and, even if the decision in *Re Evans* can be taken as authority that one is not a "convert" to the Roman Catholic religion until formally accepted by that Church, this does not necessarily follow as regards other religious denominations. In this connection, it should be borne in mind that a forfeiture clause which is void for uncertainty is wholly inoperative. If, therefore, such a clause purports to operate on those who "*profess* the Roman Catholic faith", the fact that this would apparently include a mere mental adherence to that faith (*Re Blaiberg*) would render it void for uncertainty *ab initio*, and so would prevent it from operating even where a formal profession of that faith occurs—*e.g.*, by receiving baptism. That this is so is clear from *Sifton* v. *Sifton* (*supra*), where the Privy Council emphasised that a forfeiture clause is void *ab initio* if the Court cannot at the outset define all the various

events in which the clause would operate. Moreover, the Courts have shown no willingness to assist conditions subsequent by severing from them such events as make them invalid. This has been done in the case of a compound condition which specifies several *distinct* events, some of which infringe the perpetuity rule—*e.g.*, *Re Curryer's Will Trusts*, [1938] Ch. 952 (noted *ante*, vol. 3, pp. 210, 211); but even in such cases the Court does not sever from a condition events which are not distinctly and separately expressed in it. Evidently, therefore, a clause for forfeiture intended to operate when a donee assumes a certain state of mind should be so expressed as to apply only upon the happening of some external ascertainable event or events, such as his formal acceptance into a certain church or sect or his compliance or failure to comply with specified or ascertainable observances of the church or sect concerned.

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4. *INCOME TAX CASES.*

[The decisions selected for notice are not necessarily those of the greatest importance from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Annuity—deficiency made up out of capital.—In *Williamson* v. *Ough*, 20 T. C. 194, Lord Russell observed that "it is well settled that a payment out of corpus may properly be assessable income in the hands of the recipient. A familiar instance is the case of an annuity charged on the income and corpus of an invested fund; all moneys raised out of corpus to provide the amount of the annuity will be assessable income". The application of this principle is illustrated by the decision in *Brodie's Trustees* v. *C. I. R.*, 17 T. C. 432, and a further illustration has now been provided by the recent decision in *Peirse-Duncombe's Trustees* v. *C. I. R.* (1940), T. R. 247. The income of a trust fund having become insufficient to pay certain testamentary annuities in full, the persons having interests in the fund entered into a deed of family arrangement whereby the trustees were authorised to draw on capital for the annuities, if and to the extent to which the trust income was insufficient. Having regard to the decision in *Brodie's Trustees* v. *C. I. R.*, above, it was not disputed that an assessment under Rule 21 of the All Schedules Rules was competent in respect of so much of the annuities as was paid by the trustees out of capital in conformity with the deed of family arrangement. But a question

still remained to be decided with reference to certain of the payments made before the execution of the deed. The testator had directed the trustees to set aside investments to answer the annuities and had further directed that, pending such setting aside of investments, "the persons who would be entitled to the income thereof, if set apart, shall be entitled to receive out of the income . . . of my residuary estate interest . . . equal to the annual sum hereinbefore directed to be secured for her or his benefit". The trustees had failed to set aside investments, but they had paid the annuities in full and had done so, when the trust income was insufficient, by resorting to borrowing. Macnaghten, J., rejected the contention that, in these circumstances, the trustees, in making payments in excess of the income of the trust fund, were not paying the annuities but were making voluntary payments in respect of which they were not assessable under Rule 21. The trustees had, in fact, made the payments under deduction of tax—of itself a clear indication that they were paying the annuities. To the extent to which the payments were made out of borrowed moneys they were made out of capital, but it was clear, nevertheless, on the authority of the cases cited above, that this did not prevent them from having the character of income in the hands of the recipients so as to come within Rule 21.

Surtax annual charges—settlor entitled to loans from trustees. —In *D'Ambrumenil* v. *C. I. R.*, [1940] 1 K. B. 850, a settlor had, in February, 1937, covenanted to pay to trustees the sum of £20,000 in respect of the year ending January 31, 1937, and thereafter to pay for each year to 1945 a sum equal to three-fourths of his actual income from all sources. The payments were to be held by the trustees on trust to pay to a named person such amounts as the settlor should direct, and, subject thereto, on trust for accumulation. It was further provided that the settlor should be entitled to require the trustees to lend him any part of the trust funds without interest or security and to leave such loans outstanding for as long as the settlor should think fit, the trustees to be free from liability for any loss. On a claim to deduct the annual payments in the computation of the settlor's total income for surtax purposes, it was held by Wrottesley, J., that, apart from other considerations, the claim failed for the reason that payments were not annual payments whereby the settlor's income was or might be diminished within the meaning of section 27 (1) (b) of the Income Tax Act, 1918. Having regard to the provisions of the deed as described above, the payments could not be regarded as effective payments, and accordingly section 27 (1) (b) of the Income

Tax Act did not—it was held—apply so as to enable the settlor to treat them as a charge on his income.

This was sufficient to dispose of the case, but the learned Judge also dealt with points raised under paragraphs (a) and (b) of section 20 (1) of the Finance Act, 1922. Paragraph (a) of section 20 (1) is concerned with income of which a disponor can, without the consent of any other person, obtain for himself the beneficial enjoyment. A fresh attack on tax avoidance by means of annual payments was launched by section 38 of the Finance Act, 1938, and the effect of section 41 (2) of that Act is that no question can arise under paragraph (a) of section 20 (1) of the 1922 Act in the computation of surtax liability for any year later than 1936–37, though by reason of paragraph 5 of Part II of the Third Schedule to the 1938 Act it may be necessary, in certain cases, to consider whether paragraph (a) would have applied had it still been in force. In *D'Ambrumenil's Case*, above, the deed was executed in February, 1937, and the only year to which paragraph (a) could apply was 1936–37. So far as that year was concerned, it was held that the payments were caught by paragraph (a).

Paragraph (b) of section 20 (1) of the 1922 Act is still in force. This is the paragraph relating to income which, under a disposition made by any person, is payable to or for the benefit of another person for a period which cannot exceed six years. In *D'Ambrumenil's Case* the first payment was, as has been seen, to be of a fixed amount of £20,000, and subsequent payments were to be equal to three-fourths of the settlor's income for the year in question. As regards the first payment of £20,000, it was held that paragraph (b) of section 20 (1) of the 1922 Act applied, since the £20,000 stood by itself and could not be treated as part of the same series of payments as the later payments of amounts equal to three-fourths of the settlor's income. The learned Judge thought that it was clear that there must be " some constant element " in the payments. " It may be ", he said, " that the constant element introduced by the same fraction of a man's income for the requisite number of years would be sufficient ", but in *D'Ambrumenil's Case* there was no continuity at all between the £20,000 and the later payments, and paragraph (b) of section 20 (1) of the 1922 Act accordingly applied to the £20,000 so as to require it to be treated as income of the settlor.

Transfer of assets—associated operations—Finance Act, 1936, s. 18.—The main points decided in *MacDonald* v. *C. I. R.*, [1940] W. N. 176, can be explained without setting forth in detail the

somewhat complicated facts of the case. The assessment appealed against was made under section 18 of the Finance Act, 1936, which is designed to prevent avoidance of tax by means of transfers of assets to persons abroad. The proviso to section 18 (1), as originally enacted, made the section inapplicable where it was shown that "the transfer and any associated operations were effected mainly for some purpose other than the purpose of avoiding liability to taxation". In *MacDonald's Case*, above, Macnaghten, J., expressed the view—though not without some hesitation—that "taxation", in this context, means income tax and does not include (for example) death duties. The original proviso to section 18 (1) has been repealed, and other words have been inserted in its place, by section 28 (2) of the Finance Act, 1938, but the word "taxation" still appears, and *MacDonald's Case* supplies judicial authority on its construction. A second point considered in *MacDonald's Case* was one which had already arisen in *Cottingham's Executors* v. *C. I. R.*, 22 T. C. 344. It was once more made clear that in order to benefit by the proviso to section 18 (1), the taxpayer must show that both the transfer and also any "associated operations" were effected, as to each of them, for some purpose other than that of avoiding liability to taxation. The original proviso to section 18 (1) is now applicable only in relation to the years of assessment 1935–36 and 1936–37. Under the substituted provisions inserted by section 28 (2) of the 1938 Act the point cannot arise so far as paragraph (a) of those provisions are concerned. The decisions just mentioned dispose of any question which might have arisen under paragraph (b).

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5. *DEATH DUTY CASES.*

Succession duty—variation of settlement by private Act of Parliament.—The decision of the Court of Appeal in *Att.-Gen.* v. *Glyn, Mills & Co.*, [1939] 3 All E. R. 236 (see *The Conveyancer*, March, 1939, at pp. 357–8) has now been affirmed by the House of Lords: (1940), 19 A. T. C. 42.

Estate duty—gift inter vivos*—identification of property to be valued.*—The decision in *Re Payne, Poplett* v. *Att.-Gen.*, [1939] 1 Ch. 865 (see *The Conveyancer*, September, 1939, at pp. 111–2), has now been affirmed by the Court of Appeal: (1940), 19 A. T. C. 142. Leave has been granted to appeal to the House of Lords.

PRECEDENTS

LANDLORD AND TENANT (WAR DAMAGE) ACT, 1939.

Form 1.

Notice of War Damage by Tenant or Mortgagor to Landlord or Mortgagee under Section 2 (1) (a) (*a*).

This and the following notices were drafted by B. A. Bicknell, of Lincoln's Inn.

To A [*landlord*] of *etc.*

I, B [*tenant or mortgagor*] of *etc.* [*or*, I, B of *etc.* as agent for and on behalf of C [*tenant or mortgagor*] of *etc.*] pursuant to the provisions of the Landlord and Tenant (War Damage)

(*a*) In order to bring the provisions of the Landlord and Tenant (War Damage) Act, 1939, into operation and to ascertain the respective rights of the parties to a lease of property which suffers war damage, it is necessary to serve certain notices. This and the following forms are intended to give effect to the requirements of the Act. The provisions of the Act are considered as a whole *ante*, p. 39.

All notices served under this Act must comply with the requirements of s. 20. It is to be observed that this section provides for service on a former landlord or tenant, where the person serving the notice does not know of the change of ownership.

S. 20 provides: "(1) Any notice required or authorised to be served under this Act shall be in writing.

"(2) Any such notice may be served either—(a) by delivering it to the person on whom it is to be served; or (b) by leaving it at the usual or last known place of abode of that person; or (c) by sending it in a prepaid registered letter addressed to that person at his usual or last known place of abode; or (d) in a case where it is to be served on a body corporate, by delivering it to the secretary or clerk thereof at the registered or principal office thereof or sending it in a prepaid registered letter addressed to the secretary or clerk thereof at that office; or (e) in such other manner as the court on an application made in that behalf may direct.

"(3) Where the interest of a former landlord or tenant in the land comprised in a lease has passed to any person—(a) service of any such notice on that former landlord or tenant by a person who does not know and has no reason to believe that the interest has passed, shall be treated

Act 1939 section 2 (1) (a) (*b*) HEREBY GIVE TO YOU NOTICE that the land and dwelling-house known as —— situate at —— and comprised in the lease [*or*, tenancy agreement, *or*, deed of mortgage] dated the —— day of —— and made between —— of the one part and —— of the other part on the —— day of —— sustained war damage (*c*). The general nature of the war damage so far as it is known to me [*or*, C] is as follows:— [*Here set out short particulars of the war damage.*]

[You may (*d*) enter on the said land and premises for the

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for the purpose of this Act as service on the person to whom the interest has passed; (b) the former landlord or tenant, on the receipt of any such notice, shall forthwith serve the notice on the person to whom the interest has passed, and, if he fails to do so, shall be liable to make good to any other person any damage suffered by that other person by reason of the failure.

"(4) A notice with respect to a lease shall be deemed for the purposes of this Act to have been served on the landlord if it is served on any person for the time being authorised by the landlord to receive the rent payable under the lease."

Under s. 21 the provisions of the Act have effect in relation to war damage notwithstanding any contract to the contrary made before the damage occurred.

(*b*) S. 2 provides that: "(1) Where, by virtue of the provisions (whether express or implied) of any lease (whether made before or after the commencement of this Act) or any contract collateral thereto, an obligation to repair is imposed on the tenant, the lease shall have effect as if there were contained therein covenants by the tenant with the landlord that, in the event of war damage occurring to the land comprised in the lease, the tenant will—(a) as soon as practicable after the damage has become known to him, serve a notice on the landlord stating that the damage has occurred and the general nature of the damage so far as it is known to him; and (b) permit the landlord or any person authorised by him, at such times as may be reasonable in the circumstances, to enter upon the land for the purpose of ascertaining the extent of the damage and making it good either temporarily or permanently.

"(2) The foregoing subsection shall have effect as if references to a lease, tenant and landlord included respectively references to a mortgage, mortgagor and mortgagee: Provided that it shall not be lawful for a mortgagee without the leave of the court to enforce any right or remedy arising out of a breach of the covenant referred to in paragraph (a) of the foregoing subsection."

(*c*) "War damage" is defined by s. 24 as meaning "damage caused by, or in repelling enemy action, or by measures taken to avoid the spreading of the consequences of damage caused by, or in repelling, enemy action".

(*d*) This section does not require the tenant to state in the notice when the landlord may enter on the land but, if the tenant can state when this will be allowed, it is convenient to do so.

purpose of ascertaining the extent of the damage and making it good either temporarily or permanently at any time between the hours of —— and —— if you will first give to me —— hours' notice at the above address of the time at which you wish to enter on the land.]

Dated the —— day of ——.

(Signed) ——.

Form 2.

Notice of Disclaimer by Tenant to Landlord under Section 4 (2) (a) (*a*).

To A [*landlord*] of *etc.*

I, B [*tenant*] of *etc.* [*or*, I, B of *etc.* as solicitor and agent for and on behalf of C [*tenant*] of *etc.*] pursuant to the Landlord

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(*a*) See note (*a*), *ante*, p. 449, as to the service of the notice. Under s. 4 (2) (a) of the Landlord and Tenant (War Damage) Act, 1939, where land comprised in a lease is unfit by reason of war damage, the tenant may serve on the landlord a notice of disclaimer, stating that he elects to disclaim the lease. Alternatively under s. 4 (2) (b) he may serve a notice of retention, stating that he elects to retain the lease on the terms specified in the Act. If he does neither and the landlord does not serve a notice to elect under sub-s. (3) of s. 4, the lease will continue in operation and the liability to pay rent and fulfil the covenants contained in it will remain unaffected.

The effect of a notice of disclaimer is that the lease disclaimed is deemed to have been surrendered, and sub-leases, with certain exceptions, are also deemed to have been surrendered: s. 8. It is to be observed that the notice of disclaimer operates from the date when it is served. The landlord may, under s. 4 (5), serve a notice to avoid disclaimer. He must, under s. 5, serve such a notice within one month or such extended or abridged period as that section allows. Further, under s. 6 (1) any person interested in the lease or in the reversion expectant thereon may, within one month from the service of the notice of disclaimer, apply to the Court to determine whether the notice is of no effect on the ground that the land comprised in the lease was not unfit by reason of war damage when the notice was served.

It is to be observed that the provisions of the Act providing for the service of notices of disclaimer, retention, etc., as a preliminary step towards adjusting the rights of the parties do not apply to agricultural or mining leases: s. 17. Where buildings or works comprised in such a lease are unfit by reason of war damage, the Court has power, on the application of the tenant, to determine the lease or to modify its terms as appears just, having regard to all the circumstances of the case: s. 19.

This form will be used in conjunction with Form 3, whereby the tenant gives notice to sub-tenants, etc., of the disclaimer.

This form may also be used where a landlord, on whom a notice of

and Tenant (War Damage) Act 1939 section 4 (2) (a) HEREBY GIVE TO YOU NOTICE that I [C] elect[s] to disclaim the lease [tenancy agreement] dated the —— day of —— and made between —— of the land and dwelling-house known as —— situate at —— as such land is unfit (*b*) by reason of war damage (*c*).

I have [C has] (*d*) granted no underlease of the said premises and have not mortgaged or charged the same [*or*, I have granted the following underlease[s] [tenancy agreement[s]] of the said premises namely an underlease made the —— between myself of the one part and V of (*here set out the under-tenant's address in full*) of the other part for a term of —— years at the annual rent of £——. By an assignment made the —— the said premises were assigned by the said V to X of [*here set out assignee's address in full*]. By a deed of mortgage [*or*, legal charge] made the —— day of —— between myself of the one part and Y of [*here set out mortgagee's address in full*] of the

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disclaimer has been served, is himself a tenant and wishes himself to serve a notice of disclaimer on his superior landlord: see s. 5 (3). In this case, the landlord should also inform his tenant, in accordance with the provisions of s. 5 (3) (b), that he has served such notice of disclaimer on his superior landlord. Form 8, *post*, p. 458, may be adapted for this latter purpose.

(*b*) Under s. 24 "unfit" means—"(a) in relation to buildings or works, or to land of which three-quarters or more of the value is attributable to buildings or works, unfit for the purpose for which those buildings or works were used or adapted for use immediately before the occurrence of the war damage in question, having regard to the class of tenant likely to occupy similar buildings or works which are not unfit for that purpose, to the standard of accommodation available at the material time, and to all other circumstances; and (b) in relation to other land, unfit for any purpose for which the tenant can be reasonably expected to use the land, having regard to the terms of the lease under which it is held".

(*c*) See note (*c*), p. 450.

(*d*) A tenant serving a notice of disclaimer must insert in such notice the particulars required by s. 7 (1). This sub-section provides that: "(1) A tenant serving a notice of disclaimer shall include therein such of the following particulars with respect to the lease disclaimed as are known to him, or can reasonably be ascertained by him, namely—(a) the term of and the rent reserved by any immediate underlease of the land comprised in the lease or any part thereof; (b) the name and address of the person to whom that underlease was granted and of the person (if any) to whom it has been assigned; (c) if the term created by the lease is mortgaged, the fact of the mortgage and the name and address of the mortgagee and his successor in title (if any)."

other part I mortgaged [charged] the said premises in favour of the said Y and the said Y has assigned the said mortgage [charge] to Z of [*here set out assignee's name in full*]] [*or*, I have granted underleases [tenancy agreements] of [parts of] the said premises. Particulars of the said underleases [tenancy agreements] and the terms thereof are contained in the first column of the Schedule hereto the names and addresses of the several under-tenants are specified in the second column of the said Schedule and the names and addresses of the persons (if any) to whom such underleases have been assigned are specified in the third column of the said Schedule].

Dated the —— day of ——.

(Signed) ——.

The Schedule.

Particulars of underleases or tenancy agreements and of the term and rent.	Names and addresses of sub-tenants.	Names and addresses of assignees of underleases or tenancy agreements.

Form 3.

Notice of Disclaimer to Sub-tenant, Mortgagee or Assignee under Section 7 (2) (*a*).

To A [*sub-tenant, mortgagee or assignee*] of *etc.*

I, B [*landlord, mortgagor or assignor*] of *etc.* [*or*, I, B of *etc.* as agent for and on behalf of C [*landlord, mortgagor or*

(*a*) See note (*a*), *ante*, p. 449, as to the service of this notice.

Where a tenant serves a notice of disclaimer (Form 2, *ante*, p. 451) on his landlord, he must, under s. 7 (2), give notice to persons deriving title under him of the fact that he has given such notice of disclaimer. Sub-s. (2) provides: "Within seven days from the service of a notice of disclaimer, the tenant serving the notice shall serve upon any person

assignor] of *etc.*] pursuant to the provisions of the Landlord and Tenant (War Damage) Act 1939 section 7 (2) HEREBY GIVE TO YOU NOTICE that on the —— day of —— I [C] served a notice on D [*superior landlord*] of *etc.* my [his] superior landlord electing to disclaim the lease [tenancy agreement] dated the —— day of —— and made between the said D of the one part and myself [C] of the other part [made between E of the one part and F of the other part] of the land and dwelling-house known as —— situate at —— of which premises you are a sub-tenant [mortgagee, assignee] as the said premises had become unfit (*b*) by reason of war damage (*c*) [and (*d*) I enclose a copy of the said notice of disclaimer].

Dated the —— day of ——.

(Signed) ——.

Form 4.

Notice of the Receipt of a Notice of Disclaimer under Section 7 (3) (*a*).

To A [*sub-tenant, mortgagee or assignee*] of *etc.*

I, B [*landlord, mortgagor or assignor*] of *etc.* [I, B of *etc.* as agent for and on behalf of C [*landlord, mortgagor or*

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claiming immediately under him (whether as assignee, mortgagee or lessee) in respect of an interest in the land comprised in the lease a notice stating that he has served the notice of disclaimer and the name and address of the landlord on whom it was served and such other particulars as are necessary to identify the lease disclaimed."

(*b*) See note (*b*), p. 452.

(*c*) See note (*c*), p. 450.

(*d*) The Act does not require the tenant to send the sub-tenant a copy of the notice of disclaimer, but in some cases it will be convenient to do so.

(*a*) See note (*a*), *ante*, p. 449, as to the service of this notice.

Where a tenant gives a notice of disclaimer (Form 2, *ante*, p. 451) under s. 4 (2) (a), he has, under s. 7 (2), to give notice of such disclaimer to persons claiming immediately under him (Form 3, *ante*, p. 453). When he has done this, these persons, under s. 7 (3), have, in their turn, to give notice to persons immediately deriving title under them. This form is for use by persons who have received a notice that their immediate landlord, mortgagor or other person through whom they have derived title has received notice that such a disclaimer has been made. This notice has to be somewhat lengthy as it has to comply with the requirements

assignor]] pursuant to the provisions of the Landlord and Tenant (War Damage) Act 1939 section 7 (3) HEREBY GIVE TO YOU NOTICE that on the —— day of —— D [*superior landlord, mortgagor or assignor*] of *etc.* served on me [C] a notice stating that he had served a notice on the —— day of —— on E [*head landlord*] of *etc.* his superior landlord electing to disclaim the lease [tenancy agreement] dated the —— day of —— and made between X of the one part and Y of the other part of the land and dwelling-house known as —— situate at —— of which premises you are a sub-tenant [mortgagee, assignee] as the said premises had become unfit (*b*) by reason of war damage (*c*) and you are required pursuant to the provisions of sub-section 3 of section 7 of the said Act within seven days from the receipt of this notice to serve upon every person (other than myself) who has immediately derived from you an interest in the land comprised in the lease or to whom you have immediately assigned such an interest a notice stating the date on which this notice was served on you and the terms thereof If (*d*) you fail to comply with the provisions of section 7 you will be liable to make good to any other person any damage suffered by that other person by reason of that failure [I (*e*) enclose a copy of the said notice which was served on me by D as aforesaid].

Dated the —— day of ——.

(Signed) ——.

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of sub-ss. (3) and (4) of s. 7, which provide: "(3) Every person upon whom a notice is served in pursuance of the last preceding sub-section or this sub-section shall, within seven days from the receipt of the notice, serve upon every person (other than the person from whom he has received the notice)—(a) who has immediately derived from him an interest in the land comprised in the lease; or (b) to whom he has immediately assigned such an interest; a notice stating the date on which the first-mentioned notice was served on him and the terms thereof and the effect of this and the next following sub-section.

"(4) If any person fails to comply with the provisions of this section, he shall be liable to make good to any other person any damage suffered by that other person by reason of the failure."

(*b*) See note (*b*), p. 452.

(*c*) See note (*c*), p. 450.

(*d*) See s. 7 (4).

(*e*) This is not made necessary by the section but it may be convenient.

Form 5.

Notice of Retention by Tenant to Landlord under Section 4 (2) (b) (*a*).

To A [*landlord*] of *etc.*

I, B [*tenant*] of *etc.* [I, B of *etc.* as agent for and on behalf of C [*tenant*] of *etc.*] pursuant to the Landlord and Tenant (War Damage) Act 1939 section 4 (1) (b) HEREBY GIVE TO YOU NOTICE that I [C] elect[s] to retain the lease [tenancy agreement] dated the —— day of —— made between yourself of the one part and myself [C] of the other part of the land and dwelling-house known as —— situate at —— which said land has become unfit (*b*) by reason of war damage (*c*) on the terms specified in the said Act.

Dated the —— day of ——.

(Signed) ——.

Form 6.

Notice to Elect by Landlord to Tenant under Section 4 (3) (*d*).

To A [*tenant*] of *etc.*

I, B [*landlord*] of *etc.* [*or*, I, B of *etc.* as agent for and on behalf of C [*landlord*] of *etc.*] pursuant to the Landlord and

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(*a*) See note (*a*), *ante*, p. 449, as to the service of this notice.

Where land comprised in a lease is unfit by reason of war damage the tenant may, under s. 4 (2), either disclaim (Form 2, *ante*, p. 451) or serve a notice of retention on the landlord under sub-s. 2 (b) stating that he elects to retain the lease on the terms specified in the Act. The effect of a notice of retention is stated in s. 10.

(*b*) See note (*b*), *ante*, p. 452.

(*c*) See note (*c*), *ante*, p. 450.

(*d*) See note (*a*), *ante*, p. 449, as to the service of this notice.

Where a tenant does not serve a notice of disclaimer or a notice of retention under s. 4 (2) the landlord may force his hand and require him to do one or the other.

S. 4 (3) provides: "The landlord may, if no such notice has been served by the tenant, serve upon the tenant a notice (hereafter in this Act referred to as a 'notice to elect') requiring the tenant to serve on him, within the period allowed under this Act, either a notice of disclaimer or a notice of retention.

"(4) Where a notice to elect is served and the tenant does not comply

Tenant (War Damage) Act 1939 section 4 (3) HEREBY GIVE TO YOU NOTICE that I [C] require[s] you within the period of one month or such extended or abridged period as may be allowed to you under the said Act either to serve on me [him] a notice of disclaimer of the lease [tenancy agreement] dated the —— day of —— made between myself [C] of the one part and yourself of the other part of the land and dwelling-house known as —— situate at —— which said land has become unfit (*b*) by reason of war damage (*c*) or to serve on me [C] a notice of retention of the said lease.

Dated the —— day of ——.

(Signed) ——.

Form 7.

Notice to Elect by Tenant to Sub-tenant under Section 5 (2) (b) (*a*).

To A [*sub-tenant*] of *etc.*

WHEREAS by a notice to elect served upon me [D] on the —— day of —— by B [*superior landlord*] of *etc.* my [D's] superior

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therewith within the said period, he shall, unless the notice is of no effect under this Part of this Act, be deemed for the purpose of this Act to have served on the landlord at the expiration of the said period a notice of retention."

Under s. 5 (1) the tenant has one month from the date of the service of the notice of election to comply with it. If, however, he has granted an underlease the period is extended in the manner laid down in the section if he serves a notice of election (Form 7, *supra*) on his sub-tenant. The tenant may within one month of the service of the notice serve on the landlord a counter-notice (Form 10, *post*, p. 460) under s. 6 (2) claiming that the notice to elect is of no effect on the ground that the land to which it relates was not unfit by reason of war damage at the time when the notice was served.

(*b*) See note (*b*), *ante*, p. 452.

(*c*) See note (*c*), *ante*, p. 450.

(*a*) See note (*a*), *ante*, p. 449, as to the service of this notice.

A tenant on whom a notice of election is served is not obliged to consult his sub-tenants as to what course he shall adopt. If he does serve a notice of retention or does nothing, which has substantially the same effect, he need not inform his sub-tenants. If he serves a notice of disclaimer (Form 2, *ante*, p. 451) under s. 4 (2) (a) he must give notice of the disclaimer to persons claiming immediately under him (Form 3, *ante*, p. 453) in accordance with the requirements of s. 7 (2). The tenant may, however, under s. 5 (2) (b) serve a notice on his sub-tenant requiring the sub-tenant to elect under his underlease. Such a notice must be served

landlord pursuant to the provisions of the Landlord and Tenant (War Damage) Act 1939 section 4 (3) the said B required me [D] within the period allowed by the said Act either to serve on him a notice of disclaimer of the lease [tenancy agreement] dated the —— day of —— and made between the said B of the one part and myself [D] of the other part of the land and dwelling-house known as —— situate at —— which said land has become unfit (*b*) by reason of war damage (*c*) or to serve on him a notice of retention of the said lease Now I, C [*tenant*] of *etc.* [*or*, I, C as agent for and on behalf of D [*tenant*] of *etc.*] pursuant to the power conferred on me by sections 4 (3) and 5 (2) (b) of the said Act HEREBY GIVE TO YOU as my [D's] sub-tenant NOTICE to elect within the period allowed by the said Act either to serve on me [D] a notice of disclaimer of the underlease [tenancy agreement] dated the —— day of —— made between myself [D] of the one part and yourself of the other part of the said land and dwelling-house known as —— or to serve on me [D] a notice of retention of the said underlease [tenancy agreement].

Dated the —— day of ——.

(Signed) ——.

Form 8.

Notice to Landlord of Service of Notice to Elect on Sub-tenant under Section 5 (2) (b) (*a*).

To A [*landlord*] of *etc.*

I, B [*tenant*] of *etc.* [I, B of *etc.* as agent for and on behalf of C [*tenant*] of *etc.*] pursuant to the Landlord and Tenant

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within fourteen days of the service of the notice to elect by the superior landlord. Where such a notice is served on a sub-tenant and the superior landlord is informed of the service, the period of one month allowed to the tenant under s. 5 (1) is extended by the provisions of s. 5 (2).

(*b*) See note (*b*), *ante*, p. 452.

(*c*) See note (*c*), *ante*, p. 450.

(*a*) See note (*a*), *ante*, p. 449, as to the service of this notice.

This form is for use in conjunction with Form 7, *ante*, p. 457. Where a tenant serves a notice to elect on a sub-tenant under s. 5 (2) (b), unless the tenant informs his landlord in writing that he has served such a notice on his sub-tenant, the tenant will have to comply with the notice

(War Damage) Act 1939 section 5 (2) (b) HEREBY GIVE TO YOU NOTICE that on the —— day of —— I [C] served notice to elect on D [*sub-tenant*] of *etc.* my [C's] sub-tenant requiring the said D within the period allowed by the said Act either to serve on me [C] a notice of disclaimer of the underlease [tenancy agreement] dated the —— day of —— made between myself [C] of the one part and the said D of the other part of the land and dwelling-house known as —— situate at —— or to serve on me [C] a notice of retention of the said underlease [tenancy agreement].

Dated the —— day of ——.

(Signed) ——.

Form 9.

Notice to Avoid Disclaimer by Landlord to Tenant under Section 4 (5) (*a*).

To A [*tenant*] of *etc.*

WHEREAS by a notice of disclaimer dated the —— day of —— made pursuant to the provisions of section 4 (2) (a) of the Landlord and Tenant (War Damage) Act 1939 and duly served on

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to elect given to him within one month and will not be entitled to have that period extended under s. 5 (2).

This form may be adapted for use where a landlord, who is himself a tenant, having received a notice of disclaimer from his tenant, serves a notice of disclaimer on his superior landlord. In such a case, if he is to obtain the benefit of the extended time for service of a notice to avoid disclaimer under s. 5 (3), he must, under paragraph (b) thereof, inform his tenant in writing that he has given such a notice of disclaimer to his superior landlord.

(*a*) See note (*a*), *ante*, p. 449, as to the service of this notice.

This notice operates under sub-s. (5) of s. 4. Sub-s. (5) provides: "Where a notice of disclaimer is served (whether in pursuance of a notice to elect or not) the landlord may, within the period allowed under this Act, serve upon the tenant a notice (hereafter in this Act referred to as a 'notice to avoid disclaimer') requiring the tenant to retain the lease on the terms hereafter specified in this Act."

The period within which a notice to avoid disclaimer may be served is one month from the date when the notice of disclaimer was served (s. 5 (1)), except in the case where the landlord on whom the notice is served is himself a tenant under a superior lease, when, if he serves a notice of disclaimer on his superior landlord and gives notice of such service to his tenant, the period of one month may be extended in the

me [B] you elected to disclaim the lease [tenancy agreement] dated the —— day of —— and made between myself [B] of the one part and yourself of the other part of the land and dwelling-house known as —— situate at —— Now I, B [*landlord*] of *etc.* [*or*, I, C as agent for and on behalf of B [*landlord*] of *etc.*] pursuant to the power conferred on me by section 4 (5) of the said Act HEREBY GIVE TO YOU NOTICE to avoid your aforesaid disclaimer and I require you to retain the aforesaid lease [tenancy agreement] on the terms specified in the said Act.

Dated the —— day of ——.

(Signed) ——.

Form 10.

Counter-notice by Tenant to Landlord under Section 6 (2) (*a*).

To A [*landlord*] of *etc.*

WHEREAS by a notice to elect dated the —— day of —— and served on me [B] on the —— day of —— you required me [B] in pursuance of the provisions of section 4 (3) of the Landlord and Tenant (War Damage) Act 1939 within the period

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manner provided by s. 5 (3). The period may also be extended or abridged by the Court under s. 5 (4).

The terms on which the tenant retains the lease are set out in s. 11.

Where a notice of disclaimer is served, it is also open to the landlord to apply within one month to the Court under s. 6 (1) to determine whether the notice is of no effect on the ground that the land comprised in the lease was not unfit by reason of war damage at the time when the notice was served.

(*a*) See note (*a*), *ante*, p. 449, as to the service of this notice.

The power to serve and the effect of a counter-notice is contained in sub-ss. (2) and (3) of s. 6, which provide: "(2) Within one month from the service of a notice to elect on a tenant, he may serve on the landlord a notice (hereafter in this section referred to as a 'counter-notice') (a) claiming that the notice to elect is of no effect on the ground that the land to which it relates was not unfit by reason of war damage at the time when the notice was served; and (b) stating the effect of the next following sub-section.

"(3) Where a counter-notice is served, the notice to elect shall be of no effect unless the court, on the application of the landlord made within fourteen days from the service of the counter-notice, determines that the land in question was unfit by reason of war damage at the time when the notice to elect was served."

allowed by the Act either to serve on you a notice of disclaimer of the lease [tenancy agreement] dated the —— day of —— made between yourself of the one part and myself [B] of the other part of the land and dwelling-house known as —— situate at —— or to serve on you a notice of retention of the said lease Now I, B [*tenant*] of *etc.* [*or*, I, C of *etc.* as agent for and on behalf of B [*tenant*] of *etc.*] pursuant to the power conferred on me by section 6 (2) of the said Act HEREBY GIVE TO YOU A COUNTER-NOTICE that I claim that your said notice to elect is of no effect on the ground that the land to which it relates was not unfit (*b*) by reason of war damage (*c*) at the time when the notice was served and your said notice to elect will be of no effect unless the Court on the application of you the landlord made within fourteen days from the service of this counter-notice determines that the land in question was unfit by reason of war damage at the time when your said notice to elect was served.

Dated the —— day of ——.

(Signed) ——.

Form 11.

Notice of Disclaimer of a Ground Lease by a Tenant to a Landlord under Section 13 (3) (*a*).

To A [*landlord*] of *etc.*

WHEREAS by an order of the —— Division of the High Court of Justice [the County Court of ——] dated the —— day

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(*b*) See note (*b*), *ante*, p. 452.

(*c*) See note (*c*), *ante*, p. 450.

(*a*) See note (*a*), *ante*, p. 449, as to the service of this notice.

The provisions of the Landlord and Tenant (War Damage) Act, 1939, are by s. 13 modified in the case of ground leases. A ground lease is defined in s. 24 as meaning "a lease at a rent (or, where the rent varies, at a maximum rent) which does not substantially exceed the rent which a tenant might reasonably have been expected, at the commencement of the term created by the lease, to pay for the land comprised in the lease, excluding any buildings, for a term equal to the term created by the lease."

Sub-s. (2) of s. 13 provides that: "The tenant shall not be entitled to serve a notice of retention nor, unless the court otherwise orders, a notice

of —— upon my application [on the application of B] the Court being satisfied that the land and dwelling-house known as —— situate at —— comprised in a ground lease made the —— day of —— between X of the one part and Y of the other part had suffered war damage and that in all the circumstances of the case it was equitable to allow me [B] to disclaim the said lease it was declared that I [B] was at liberty to disclaim the said lease Now I, B [*tenant*] of *etc.* [*or*, I, C of *etc.* as solicitor and agent for and on behalf of B [*tenant*] of *etc.*] pursuant to the provisions of the Landlord and Tenant (War Damage) Act 1939 and the said order HEREBY GIVE TO YOU NOTICE that I [B] elect[s] to disclaim the said ground lease.

Dated the —— day of ——.

(Signed) ——.

Form 12.

Notice of Disclaimer as regards Part of the Premises in a Multiple Lease pursuant to an Order of the Court under Section 15 (*a*).

To A [*landlord*] of *etc.*

WHEREAS by an order of the —— Division of the High Court of Justice [the County Court of ——] dated the —— day

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of disclaimer, and the landlord shall not be entitled to serve a notice to elect."

Sub-s. (3) provides that where the Court is satisfied, on the application of the tenant, having regard to the extent of the war damage suffered by the land comprised in a ground lease and to all the circumstances of the case, that it is equitable to allow the tenant to disclaim, the Court may order that he be at liberty to serve a notice of disclaimer under the Act.

Where a notice of disclaimer is served under s. 13 (3) in respect of a ground lease, the landlord is not entitled to serve a notice to avoid disclaimer: sub-s. (4).

(*a*) See note (*a*), *ante*, p. 449, as to the service of this notice.

Under s. 15 the position in regard to a multiple lease is somewhat different from that of an ordinary lease. A multiple lease is defined in s. 24 as meaning "a lease comprising buildings which are used or adapted for use as two or more separate tenements".

The tenant under such a lease has power to disclaim under s. 4 (2) (a) and the landlord may serve a notice to elect under s. 4 (3). But in either case, any person interested may apply to the Court within one month of the service of the notice to determine whether the tenant should be allowed to disclaim the lease, whether wholly or as respects one or

of —— it was declared that the lease [tenancy agreement] dated the —— day of —— made between X of the one part and Y of the other part of the separate tenements known as Nos. 1—20 —— Road situate at —— should be treated as if it were two separate leases one comprising the disclaimable tenement[s] more particularly described in the said order and the other comprising the remainder of the tenement[s] and consequential directions were given as to the apportionment of the rent and other matters and it was further declared that I [B] the tenant should be at liberty to serve a notice of disclaimer as respects the said lease comprising the disclaimable tenement[s] but not as respects the other lease comprising the remainder of the tenement[s] Now I, B [*tenant*] of *etc.* [*or*, I, C of *etc.* as solicitor and agent for and on behalf of B [*tenant*] of *etc.*] pursuant to the Landlord and Tenant (War Damage) Act 1939 and to the said order HEREBY GIVE TO YOU NOTICE that I [B] elect[s] to disclaim the said lease comprising the disclaimable tenement[s] but not as respects the other lease.

Dated the —— day of ——.

(Signed) ——.

Form 13.

Notice by a Former Landlord or Tenant to his Successor in Title under Section 20 (3) (*a*).

To A [*grantee or assignee*] of *etc.*

WHEREAS by a deed dated the —— day of —— made between myself [B] of the one part and yourself of the other

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more of the separate tenements comprised therein: s. 15 (2). On such an application the Court may permit the lease to be wholly disclaimed or, under sub-s. (4), if it is not satisfied that it is equitable to permit the lease to be wholly disclaimed, but is satisfied that it is equitable to allow it to be disclaimed as regards one or more of the separate tenements comprised therein, referred to as "disclaimable tenements", the Court may order the lease to be treated as two separate leases, one comprising the disclaimable tenements and the other the remainder of the tenements, giving consequential directions apportioning rent, etc. Under paragraph (c) the Court may "order that the tenant shall be at liberty to

part I [B] duly conveyed [assigned] all my [B's] estate and interest in the freehold [leasehold] premises known as —— situate at —— to you AND WHEREAS I have [B has] been served by C of *etc.* the present tenant [estate owner] of the said premises with a notice dated the —— day of —— [*here set out nature of notice*] under the provisions of the Landlord and Tenant (War Damage) Act 1939 in respect of the said premises Now I, B of *etc.* [*or*, I, D of *etc.* as agent for and on behalf of B of *etc.*] pursuant to the provisions of the said Act HEREBY SERVE ON YOU THE SAID NOTICE which is enclosed herewith.

Dated the —— day of ——.

(Signed) ——.

Form 14.

Codicil to Will postponing the Conversion and the Payment of Legacies whilst a State of War Exists.

I [*testator*] of *etc.* declare this to be a codicil to my will bearing date the —— day of ——

WHEREAS since the date of my said will Great Britain has become engaged in a European war and my estate has in consequence become considerably depreciated in value and to realise it whilst such conditions exist might involve realisation below the proper or normal value

Now I HEREBY DECLARE that the trustees of my said will shall be at liberty at their unfettered discretion to postpone the [sale and conversion of all or any part of my estate (except so far as may be necessary for the payment of my funeral and

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serve a notice of disclaimer as respects the lease comprising the disclaimable tenement or tenements but not as respects the other lease ".

(*a*) See note (*a*), *ante*, p. 449, as to the service of this notice.

Under s. 20 (3) where the interest of a former landlord or tenant in the land comprised in a lease has passed to any person, service of a notice under the Act on such former landlord or tenant by a person, who does not know that the interest has passed, is to be treated as service on the person to whom the interest has passed. In such a case s. 20 (3) (b) provides that the former landlord or tenant, on the receipt of any such notice, shall forthwith serve the notice on the person to whom the interest has passed. If he fails to do so, he will be liable to make good to any other person any damage suffered by that other person by reason of the failure.

testamentary expenses and debts) and the] payment of all the pecuniary legacies bequeathed by my said will or any codicil thereto [except the legacy of £—— to my wife] until Great Britain has ceased to be at war with any European Power or Powers and for one year thereafter

PROVIDED ALWAYS that in the event of my estate increasing in value or a sale of the whole or any part thereof being considered beneficial during the continuance of the said war my trustees may if they in their unfettered discretion consider that this will not be prejudicial to my estate as a whole pay the whole or a proportionate part of the pecuniary legacies bequeathed by my said will or any codicil thereto and in making any such payment I DIRECT my trustees first to pay in full all pecuniary legacies of £*x* or less and secondly and subject to such payment to pay all or a rateable proportion of the pecuniary legacies exceeding £*x* and I declare that no pecuniary legatee shall be entitled to be paid any interest in respect of his or her legacy.

SIGNED *etc.*

Form 15.

Provision in Will Reducing Certain Legacies if the Value of Testator's Estate at His Death Falls Below a Certain Figure.

But inasmuch as owing to war conditions and the present uncertainty as to values I am unable to ascertain approximately the probable value of my estate and I have disposed of my property on the footing that my estate will amount to at least £—— NOW I HEREBY DIRECT that as soon as possible after and if practicable within one year after my death my trustees shall in writing state what in the opinion of my trustees was the value on the day of my death of my net estate (meaning thereby the property disposed of by this my will after payment thereout of my funeral expenses and my debts and my testamentary expenses payable on or within one year after my death and all estate duties payable on my death but without any allowance for legacies or for legacy or succession duty or for duties or costs

that become payable more than one year after my death) AND I DECLARE that such statement when signed by my trustees shall be conclusive and binding on all parties interested or to become interested under this my will and shall not be questioned on any ground whatever even on the ground that the subsequent provisions of this clause have not been complied with AND I AUTHORISE BUT DO NOT DIRECT my trustees at the expense of my residuary estate to cause such valuations as my trustees think fit to be made as on my death of all or any assets not consisting of cash and estimates to be made of all or any sums required to be paid before my net estate can be ascertained and generally to arrive at their opinion in such manner as they in their absolute and uncontrolled discretion may think fit AND I DIRECT my trustees in making their written statement under this clause merely to state what their opinion may be and not to state or refer to any manner or material in or on which such opinion may have been formed AND I DECLARE that if my trustees shall pursuant to the directions hereinbefore contained state in writing that in their opinion my net estate as hereinbefore defined did not on my death amount in value to £5,000 but did exceed £4,000 then as from my death the sum of £500 mentioned in clause —— of this my will shall be reduced to £400 and the sum of £400 mentioned in clause —— of this my will shall be reduced to £300 AND I FURTHER DECLARE that if my trustees shall pursuant to the directions hereinbefore contained state in writing that in their opinion my net estate as hereinbefore defined did not on my death amount to £4,000 then as from my death the said sum of £500 shall be reduced to £300 and the said sum of £400 shall be reduced to £200 and in either case my will shall be read as if whenever either of the said sums of £500 and £400 is mentioned before this clause the sum to which the same is reduced by this clause had originally been inserted in place of the sum in question.

Form 16.

Form of General Agreement between Partners or Other Private Individuals to Regulate their Affairs During the War and to Provide against Eventualities (*a*).

Drafted by R. Macdonald, Solicitor.

MEMORANDUM that this Agreement is made this —— day of —— 19— BETWEEN the following persons that is to say [*insert full names and addresses of all parties to the Agreement*]

WHEREAS the country is now at war and the parties hereto whose business relationship may be affected by the course of events desire to protect each other and their estates respectively against eventualities as far as may be possible in manner hereinafter appearing

Recital of reason for agreement.

NOW IT IS HEREBY AGREED by and between the parties hereto that their relationship shall during this Agreement be regulated by reference to the following general considerations and provisions if and so far as the same shall be applicable *viz.*:—

Agreement

1. THE period of this Agreement shall be the duration of the War but its provisions shall be extended to include a reasonable period for readjustment and reconstruction immediately following the termination of the War unless or until this Agreement is sooner determined by mutual consent.

for period of the War;

2. DURING the period of this Agreement no party to it shall make or enforce against another party to it any requirement

to supersede certain contractual rights;

(*a*) In the absence of some agreement executors of partners may find themselves bound by Articles of Partnership to enforce which, during or after the War, would only inflict hardship on the surviving partner or partners. This kind of thing is liable to arise more particularly (a) where there are infant beneficiaries to be considered; (b) where one or more partners is liable to be away from business on account of national service possibly for a protracted period.

Clause 3 is not likely to be of much practical importance but has been included to meet criticism. Both this clause and the precedent generally really throw the ultimate responsibility upon a single arbitrator who would adjust in retrospect the troubles and difficulties which may be all the more formidable so long as they remain in prospect. The draft would probably require extensive revision and adaptation to meet the requirements of any particular case, but may serve to draw attention to the urgent need for something of the kind in the case of many private relationships.

or demand (whether in the nature of a liquidated demand or otherwise) which would embarrass or cripple that other party but each party shall have regard to the best interests of all parties concerned and as between the parties this Agreement may be pleaded in defence of any claim or demand which would or might prejudice one party in a way in which but for the War he would not have been prejudiced any agreement to the contrary notwithstanding.

as to alteration in value of money in event of inflation;

3. In the event of an unforeseen or radical alteration in money values attributable or partly attributable to the War any agreement between the parties thereafter to be performed shall so far as practicable be performed on the basis which would have been applicable were the value of money the same as when the agreement was concluded just allowance being made for any coincident alteration in the resources of the parties respectively consequent upon the same or the like alteration.

as to valuations;

4. During the period of this Agreement any valuation which falls to be made under any agreement between the parties shall notwithstanding any of the provisions thereof be made in a manner and on a basis which shall be fair and equitable between the parties having regard to all the circumstances of the case when the same valuation is or ought to be made.

as to absence of a party on war work;

5. Any agreement between the parties a breach of which would or might arise by reason of the absence of any party from business shall not be deemed to have arisen by reason of the absence of any party who is engaged upon service of national importance or incapacitated by illness or injury directly or indirectly attributable to the War.

as to position of personal representatives;

6. In this Agreement reference to any party shall where the context so admits include his personal representatives and the masculine shall include the feminine gender. The parties each and severally declare that his personal representative or representatives shall not be liable for any breach of trust or duty by reason of anything done or omitted pursuant to the provisions of these presents.

subject hereto parties to carry on as agreed before War.

7. Without prejudice to the generality of the foregoing provisions the parties shall in particular and so far as may be practicable duly carry into effect every obligation and agreement

between them in good faith and without partiality having regard to the true spirit as well as the letter of all arrangements in writing between them to which these presents shall nevertheless be supplemental.

8. ANY question or difference which may whether during or after the period of this Agreement arise between any parties hereto relating to anything arising out of or on the construction of this Agreement or as to the rights obligations or duties of any persons under it shall be referred to arbitration in accordance with the Arbitration Acts 1889 to 1934 or any statutory modification or re-enactment thereof and in default of agreement as to the arbitrators the reference shall be to a single arbitrator to be nominated by the President for the time being of [the Law Society London]. Arbitration clause.

AS WITNESS the hands of the parties hereto the day and year first before written.

Form 17.

Deed modifying Articles of Partnership on Account of One of the Partners becoming engaged in War Service (*a*).

THIS INDENTURE made the —— day of —— BETWEEN [*first partner*] of *etc.* of the first part [*second partner*] of *etc.* of the second part and [*third partner*] of *etc.* of the third part supplemental to an indenture of partnership dated the —— day of —— and made between the parties hereto (hereinafter referred to as "the Principal Indenture") whereby the said parties agreed to enter into partnership in the business of —— for the period and upon the terms therein mentioned Parties.

WHEREAS it is provided (amongst other things) by the Principal Indenture that each of the parties thereto shall devote his whole time and attention to the business of the partnership and shall not engage in any other business or occupation and that each of the said parties shall be entitled to receive the share of profits therein specified Recital.

(*a*) Stamp: 10s.

And whereas the said [*third partner*] has [*or*, is about to] become with the sanction of the other parties hereto engaged in war service [*or*, engaged in active military service, *or as the case may be*] and it has been agreed between the parties hereto that the terms of the Principal Indenture shall be temporarily varied or modified as hereinafter appearing

Now this indenture witnesseth as follows:—

Share of profits.

1. So long as the said [*third partner*] shall be engaged [in war service] as aforesaid he shall be entitled as his share of the profits of the said business to the annual sum of £*x* payable by equal monthly instalments of £*y* or to his share of profits estimated in the manner provided by clause —— of the Principal Indenture whichever shall be the lesser sum and clause —— shall be modified accordingly.

Modification of Principal Indenture.

2. The said [*third partner*] shall not whilst he is engaged as aforesaid be called upon to devote any of his time or attention to the business of the partnership and clause —— of the Principal Indenture shall not apply to him whilst so engaged.

3. [*Add such further provisions (if any) as may be necessary to meet the case.*]

Mode of payment.

4. In the event of the said [*third partner*] being required to leave England on military service the [monthly] sums which he is entitled to draw on account of his share of profits shall be paid to his credit at the —— Branch of the —— Bank [*or*, to his wife —— of ——] whose receipt shall be a good and effectual discharge for the same.

Continuation of partnership.

5. When and as soon as the said [*third partner*] shall cease to be engaged as aforesaid all the provisions hereinbefore contained shall cease and determine and thereupon and thereafter the partnership shall be continued in all respects upon the terms contained in the Principal Indenture.

In witness *etc.*

Form 18.

Indemnity to Trustees by Tenant for Life and Remaindermen who consent to postpone Conversion of Residuary Estate during the War (*a*).

THIS INDENTURE made the —— day of —— BETWEEN [*tenant for life*] of *etc.* of the first part [*remaindermen*] of *etc.* (hereinafter collectively called "the Remaindermen") of the second part and [*trustees*] of *etc.* (hereinafter called "the Trustees") of the third part

WHEREAS [*testator*] deceased by his will which was proved in the principal probate registry on the —— day of —— appointed the Trustees to be the executors and trustees of his said will and after certain specific and pecuniary bequests devised and bequeathed the residue of his real and personal estate unto the Trustees upon trust for sale and conversion and to hold the proceeds upon trust to pay his funeral and testamentary expenses pecuniary legacies and debts and to invest the balance in or upon the securities or investments therein mentioned and to pay the income thereof to the said [*tenant for life*] during his life and after his death as to both capital and income to divide the same equally between and amongst the remaindermen [*or as the case may be*]

AND WHEREAS the residuary estate of the said testator has by reason of the war now existing become considerably depreciated in market value and to realise the same whilst a state of war exists would involve realisation below the proper or normal value

AND WHEREAS the parties hereto of the first and second parts have requested the Trustees to postpone the sale and conversion of the said residuary estate or such part or parts thereof as they may think proper for the period hereinafter mentioned which the trustees have agreed to do upon such indemnity being given as is herein contained

NOW THIS INDENTURE WITNESSETH and it is hereby agreed and declared as follows:—

1. The said [*tenant for life*] and the Remaindermen hereby

(*a*) Stamp: 10s.

request and authorise the Trustees to postpone the sale and conversion of the said residuary estate or such part or parts thereof as they the Trustees may in their absolute discretion think fit during such time as Great Britain shall be at war with any European Power or Powers and a period of —— calendar months thereafter.

2. The said [*tenant for life*] and the Remaindermen hereby jointly and severally covenant with the Trustees and each of them that they the said covenanting parties will at all times hereafter keep the Trustees and their respective executors and administrators and other the trustees or trustee for the time being of the said will fully and effectually indemnified against all actions claims and demands and all loss damage costs and expenses brought made incurred or sustained by reason of the postponement of such sale and conversion as aforesaid.

IN WITNESS *etc.*

Form 19.

Powers of Attorney by Trustees Serving Abroad (*a*).

FORM OF DECLARATION.

I —— of —— being an officer in the Officers Emergency Reserve and in such capacity being liable to be ordered to leave the United Kingdom on foreign service at short notice, do solemnly and sincerely declare as follows:—

1. I intend to leave the United Kingdom at such a date as I may in the course of my military duty be ordered to do so for service overseas.

2. I intend to remain out of the United Kingdom for a period exceeding one month from the date on which I shall have so proceeded overseas.

3. And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act 1835.

DECLARED AT *etc.*

(*a*) See Conveyancer's Notebook, *ante*, p. 2. This form is for use under s. 25 (4) of the Trustee Act, 1925. If the power is given under the Execution of Trusts (Emergency Provisions) Act, 1939, no such declaration is necessary. See *ante*, p. 47.

Form 20.

Power of Attorney under the Execution of Trusts (Emergency Provisions) Act, 1939, by a Trustee on War Service extending to all Trusts of which he is a Trustee (*a*).

KNOW ALL MEN by this POWER OF ATTORNEY that I A of *etc.* HEREBY DECLARE and APPOINT as follows:—

1. I am (*b*) [about to become] engaged in war service (*c*)

(*a*) Stamp, 10s. This power takes effect under the Execution of Trusts (Emergency Provisions) Act, 1939. It must be attested by at least one witness: s. 3 (1). Under s. 1 (4) the power of attorney may be deposited in the Central Office of the Supreme Court under s. 219 of the Supreme Court of Judicature (Consolidation) Act, 1925. If the power confers a power to dispose of or deal with any interest in or charge upon land, s. 125 of the Law of Property Act, 1925, applies, and the power or a certified copy must be filed in the Central Office, unless it only relates to one transaction and is to be handed over on completion. The power of delegation conferred by the Act is in addition to and not in derogation of any other powers: s. 1 (6). The power conferred by s. 25 of the Trustee Act, 1925, of delegating the execution of any trust, while the trustee is abroad, is therefore unaffected and can still be exercised in appropriate cases. See *The Conveyancer and Property Lawyer* (N.S.), Vol. 1, p. 459.

It is to be observed that the power conferred by the Act of 1939 is limited to persons on war service "during the period of the present emergency". This period is defined as being "the period beginning with the first day of September nineteen hundred and thirty-nine and ending with such date as His Majesty may by Order in Council declare to be the date on which the emergency which was the occasion of the passing of this Act came to an end". It follows, therefore, that the powers conferred by this Act can only be exercised during the present war.

(*b*) The power may be made either before or after the commencement of the period during which the donor is engaged in war service: s. 3 (1).

(*c*) "War service" is defined in s. 7 as meaning: "(a) service during the period of the present emergency (whether within or outside the United Kingdom) in any of His Majesty's naval, military or air forces or the nursing service or other auxiliary service of any of those forces; (b) any other service during that period (whether within or outside the United Kingdom) in any British ship; (c) any other work or employment during that period outside the United Kingdom in connection with the present war."

The power of delegation can also be exercised by a trustee, etc., not engaged in war service in relation to any period during which (a) he is out of the United Kingdom; and (b) for any reason connected with the present war it is not reasonably practicable for him to return to the United Kingdom: s. 1 (5). In this latter case the wording of the power will need modifying so as to show that the donor, though not on war service, is nevertheless entitled to exercise the powers conferred by the Act.

within the meaning of the Execution of Trusts (Emergency Provisions) Act 1939.

2. B of *etc.* [and C of *etc.*] would as principal[s] (*e*) be competent to exercise the functions hereinafter delegated to him [them].

3. (a) THIS DEED is executed by me in exercise of the power (*f*) in this behalf conferred on me by the said Act and of every other power enabling me in this behalf.

(b) In this deed the word "functions" (*g*) has the same meaning as it has in the said Act.

4. (a) I HEREBY DELEGATE to the said B [and C] (hereinafter called "my Attorney" [*or*, "Attorneys" jointly (*h*)]) the

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(*e*) Sub-s. 3 of s. 1 prevents the appointment of certain classes of persons as attorneys. This sub-section provides that "Nothing in the foregoing provisions of this section shall authorise—(a) the delegation of the exercise of any functions to any person who would not as principal be competent to exercise those functions; . . . (c) the delegation of the exercise of any functions by one of two trustees to the other, unless that other trustee is a trust corporation; or (d) the delegation of the exercise of any functions by one of two or more trustees to any person (not being a trust corporation) to whom the exercise of functions has been delegated, whether by virtue of this section or otherwise, by the other trustee or, as the case may be, all the other trustees. In this sub-section references to a trustee include references to a personal representative." The effect of clause (c) is that a co-trustee can be appointed an attorney, provided there are two or more co-trustees in addition to the appointor, or the appointee is a trust corporation. Under the Execution of Trusts (War Facilities) Act, 1914, this could not be done: *Re Wells and Hopkinson*, [1916] 2 Ch. 289. It is to be observed that under the present Act a personal representative is in the same position as a trustee and one of two personal representatives cannot appoint the other as his attorney.

(*f*) The power authorising a trustee to delegate the exercise of the trusts is contained in s. 1 (1), which provides as follows: "Notwithstanding anything in any enactment or any rule of law or equity, a trustee, personal representative, tenant for life or statutory owner may, subject to the provisions of sub-section 3 of this section, delegate to any person, or to two or more persons jointly, the exercise, during the whole or any part of—(a) any period during which he is engaged in war service; and (b) a period of one month thereafter; of any functions vested in him as such."

(*g*) The functions which a trustee may delegate are defined in s. 7 as including "discretions, powers and duties".

(*h*) S. 1 (1) authorises the delegation "to any person or to two or more persons jointly". It seems, therefore, that it is not possible to give to two attorneys power to act severally.

execution and exercise during the period during which I am engaged in war service (*c*) and for a period of one month thereafter all functions (*g*) vested in me as trustee personal representative tenant for life or statutory owner or which may in the future (*i*) devolve on me by reason of my becoming a trustee of any estate when the administration thereof has been completed either alone or jointly with any other person or persons.

(b) Such delegation extends in the fullest manner possible to all functions (*g*) in respect of all trusts and trusteeships vested in me however numerous and of whatever character the same may be or become (except any functions in relation to an implied (*k*) or constructive trust) and in particular to the trusts mentioned in the Schedule hereto.

5. I HEREBY APPOINT my Attorney [*or*, Attorneys jointly] to be my attorney [attorneys] for me and on my behalf and in the name of myself or otherwise to execute and do or join in executing and doing all such deeds instruments acts (*l*) and things as shall be required or proper to be executed or done in or about the execution or exercise of the said functions or any of them as fully and effectually as I myself could have executed or done or joined in executing or doing the same.

6. PROVIDED ALWAYS (*m*) that nothing herein contained shall

(*i*) S. 1 (2) expressly provides that where there has been a delegation to any person of any functions relating to the administration of an estate, there may also be delegated to that person any functions which may in the future devolve on the donor of the power by reason of his becoming a trustee of the estate when the administration is completed.

(*k*) S. 1 (3) (b) expressly provides that the provisions of s. 1 (1) shall not authorise "the delegation of the exercise of any functions in relation to an implied or constructive trust".

(*l*) It is not necessary to insert an express general power to deal with stocks, shares and debentures or to operate banking accounts, in order to obviate any need for a company to identify the trustee or ascertain his powers. S. 4 (2) shows that a company giving effect to the acts of a donee of a power under this Act is not affected with any notice of the trust.

(*m*) In the event of the donor appointing a co-trustee to act as his attorney, it seems proper to terminate the donee's authority should he become by reason of deaths the only trustee other than the donor of the power. The insertion of this clause carries out the intention of s. 1 (3) (c).

authorise any person to execute or exercise any function vested in himself and myself alone as sole trustees of any trust.

IN WITNESS *etc.*

THE SCHEDULE.

[*To contain particulars of the trusts specifically referred to in the power of attorney.*]

Form 21.

Power of Attorney under the Execution of Trusts (Emergency Provisions) Act, 1939, by a Tenant for Life or Statutory Owner Delegating his Statutory Powers (*a*).

KNOW ALL MEN by this POWER OF ATTORNEY that I A of *etc.* HEREBY DECLARE and APPOINT as follows:—

1. I am (*b*) [about to become] engaged in war service (*c*) within the meaning of the Execution of Trusts (Emergency Provisions) Act 1939.

2. (a) THIS DEED is executed by me in exercise of the power (*d*) in that behalf conferred on me by the said Act and of every or any other power enabling me in this behalf.

(b) In this deed the word "functions" (*e*) has the same meaning as it has in the said Act.

3. I HEREBY DELEGATE to B of *etc.* [and C (*f*) of *etc.*] (hereinafter called "my Attorney" ["Attorneys" jointly (*g*)] the execution and exercise during the period during which

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(*a*) Stamp 10s. See note (*a*), *ante*, p. 473 to the preceding precedent. This power must be filed in the Central Office under s. 125 of the Law of Property Act, 1925, as it confers a power to dispose of or deal with land.

(*b*) See note (*b*), *ante*, p. 473.

(*c*) See note (*c*), *ante*, p. 473.

(*d*) See note (*f*), *ante*, p. 474.

(*e*) See note (*g*), *ante*, p. 474.

(*f*) It may be convenient to appoint two attorneys. It is to be observed that the restrictions imposed by s. 1 (3) set out in note (*e*), *ante*, p. 474, do not apply to a tenant for life or to a statutory owner. There is, therefore, no objection to a tenant for life or statutory owner delegating his powers to the trustees of the settlement for the purposes of the Settled Land Act, 1925.

(*g*) See note (*h*), *ante*, p. 474.

I am engaged in war service and for a period of one month thereafter of all functions (*e*) vested in me as tenant for life [statutory owner] under the settlement mentioned in Part I of the Schedule hereto over the land comprised in the vesting deed mentioned in the said Part I thereof and more particularly described in Part II of the said Schedule and over any other land subject to the trusts of the said settlement and which may from time to time be vested in me.

4. I HEREBY APPOINT my Attorney [my Attorneys jointly] to be my attorney [attorneys] for me and on my behalf and in the name of myself or otherwise to execute and do or join in executing and doing all such deeds instruments acts (*h*) and things as shall be required or proper to be executed or done in or about the execution or exercise of the said functions or any of them as fully and effectually as I myself could have executed or done or joined in executing or doing the same.

IN WITNESS *etc.*

THE SCHEDULE.

PART I.

Deed of settlement made the —— day of —— between —— of the one part and —— of the other part.

Vesting deed made the —— day of —— between —— of the one part and myself of the other part.

PART II.

[*To contain a description of the property.*]

(*h*) See note (*l*), *ante*, p. 475.

Form 22.

Statutory Declaration by a Donee of a Power of Attorney that a Trustee or Tenant for Life is Engaged in War Service within the meaning of the Execution of Trusts (Emergency Provisions) Act, 1939 (*a*).

I, B of *etc.* being the donee of a power of attorney dated the —— day of —— executed in my favour by A [*trustee*] of *etc.* a trustee [*or* personal representative, *or* tenant for life, *or* statutory owner] of a deed of settlement dated the —— day of —— and made between —— of the one part and —— of the other part [*or,* of the will dated the —— day of —— and proved on the —— day of —— of X deceased] do solemnly and sincerely declare that the said A is [*or,* was on the —— day of —— engaged on war service (*b*)] within the meaning of the Execution of Trusts (Emergency Provisions) Act 1939 and that in the matter of [*here set out briefly the transactions in respect of which the donee is exercising his powers*] I am by virtue of the said power of attorney acting in execution of the trust created by the said settlement [will] [*or,* in the administration of the said estate].

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declaration Act 1835.

[*Signature of declarant.*]

DECLARED *etc.*

(*a*) Stamp 2s. 6d. Any person dealing with an attorney appointed under the Execution of Trusts (Emergency Provisions) Act, 1939, will require the attorney to make a statutory declaration under s. 3 (3) which provides that: "A statutory declaration by the donee of a power of attorney relating to any trust or estate that the donor of the power is, or was at any specified date, engaged in war service, or that in any transaction the donee is acting in the execution of the trust or the administration of the estate, shall in favour of a person dealing with the donee of the power be conclusive evidence of that fact."

(*b*) See note (*c*), *ante,* p. 473.

Form 23.

Deed of Legal Charge in Favour of First Mortgagees Intended to Substitute a Post-war Security for a Pre-war Security (*a*).

Drafted by A. H. Withers, of Lincoln's Inn.

THIS MORTGAGE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Borrower") of the one part and B of *etc.* and C of *etc.* (hereinafter called "the Mortgagees") of the other part Parties.

WHEREAS by a mortgage (hereinafter called "the existing mortgage") dated the —— day of —— 1938 and made between the Borrower of the one part and the Mortgagees of the other part certain land and buildings known as —— situate at —— in the county of —— were demised unto the Mortgagees Recitals: Existing mortgage;

(*a*) Stamp, 6d. for £100 of the amount secured as a collateral or auxiliary security. This deed is in fact a puisne mortgage and therefore strictly speaking should be registered as a land charge under the Land Charges Act, 1925, s. 10 (1), Class C (i), but, as the mortgagees will have, as first mortgagees, all the title deeds, this is not essential.

This deed is intended to meet the case of a mortgage executed before September 2, 1939, where a mortgagor and mortgagee are in agreement in desiring the security not to be subject to the provisions of the Courts (Emergency Powers) Act, 1939. Under section 1 (2) of this Act a mortgagee cannot, without the leave of the appropriate Court, either take possession of the mortgaged property or realise his security. The scope of the sub-section is, however, limited by the proviso to the sub-section: "Provided that this sub-section shall not apply to any remedy or proceedings available in consequence of any default in the payment of a debt, or the performance of an obligation, being a debt or obligation arising by virtue of a contract made after the commencement of this Act. . . ." This proviso makes it plain that mortgages coming into being after the commencement of the Act, that is, after September 1, 1939, are not subject to the restrictions imposed by the Act. If a mortgagor is prepared to allow a mortgagee, within the scope of the Act, to exercise his statutory powers without first obtaining the leave of the Court, the requirements of the Act can be avoided by substituting for the pre-war security a post-war security. This is what this deed is intended to effect. It has the further advantage that, not only does it release the mortgagee from the restrictions imposed on the exercise of his statutory powers by the Courts (Emergency Powers) Act, 1939, it also gets over the restrictions imposed on his right to possession by the Possession of Mortgaged Land (Emergency Provisions) Act, 1939. These restrictions only apply to mortgages made before September 2, 1939.

by way of mortgage for securing the payment by the Borrower to the Mortgagees on the —— day of —— 1938 of the principal sum of £x with interest thereon as therein mentioned.

Agreement for further security.

AND WHEREAS the parties hereto have agreed that for the consideration hereinafter appearing the moneys secured by the existing mortgage shall be further secured in manner hereinafter appearing

Witnesseth.

NOW THIS DEED WITNESSETH and it is hereby agreed and declared as follows:—

1. THIS deed is executed in pursuance of the said agreement and for the mutual considerations herein appearing.

Postponement of the date for the payment of the principal.

2. (A) The Mortgagees hereby covenant with the Borrower that the Mortgagees will not before the —— day of —— 19— (*b*) demand payment of the said principal sum of £x or any part thereof if and so long as no breach shall have occurred of any of the following provisions or conditions time being in all respects of the essence of the contract namely:

(1) All interest in the existing mortgage covenanted or agreed to be paid shall be paid on or within fourteen days after the same is in the existing mortgage covenanted or agreed to be paid

(2) All obligations by these presents expressly or impliedly imposed on the Borrower (other than the covenants for payment of principal and interest) shall be duly and punctually observed and performed

(B) NOTWITHSTANDING the provisions of the preceding paragraph of this clause the principal moneys secured by the existing mortgage shall within the meaning and for all the purposes of the Law of Property Act 1925 be deemed to have become due on the day on which the same was in the existing mortgage covenanted or agreed to be paid.

Covenants by the borrower to pay the principal.

3. (A) The Borrower hereby covenants with the Mortgagees to pay to the Mortgagees all moneys now or hereafter secured by the existing mortgage at the times and in the manner at and in which the same respectively are in the existing mortgage covenanted or agreed to be paid

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(*b*) Six months from the date of the deed seems to be the proper date.

(B) The Borrower as beneficial owner and by way of legal mortgage hereby charges ALL AND SINGULAR the hereditaments and premises in the existing mortgage expressed to be demised conveyed or charged and all or if any the hereditaments and premises now or hereafter comprised in or subject to the existing mortgage WITH the payment to the Mortgagees of all moneys now or hereafter secured by the existing mortgage at the times and in the manner at and in which the same respectively are in the existing mortgage covenanted or agreed to be paid

New legal charge.

PROVIDED ALWAYS that the foregoing charge is given subject and without prejudice to the existing mortgage and the moneys thereby secured

Proviso saving existing mortgage.

(C) This mortgage shall operate as if clauses —— to —— (both inclusive) of the existing mortgage were repeated in this paragraph (C)

(D) Section 103 of the Law of Property Act 1925 shall apply to this security as if the words "two weeks" had been substituted in paragraph (ii) thereof in lieu of the words "two months"

(E) PROVIDED ALWAYS that notwithstanding anything in these presents contained the existing mortgage and all moneys (including future interest and costs) now or hereafter secured by the existing mortgage and all covenants securities powers of sale and other powers and provisions contained in or expressly or impliedly given by the existing mortgage for securing or recovering payment of such moneys or any part thereof shall continue on foot in all respects for the benefit of the Mortgagees and shall be enforceable and exercisable in the same manner as if these presents had not been executed.

Proviso saving all powers under the existing mortgage.

IN WITNESS *etc.*

Form 24.

Will of a Widower or Widow Disposing of a Substantial Estate and Providing for Sons and Grandchildren, with Especial Provisions for Sons Engaged in War Service (*a*).

Drafted by B. A. Bicknell, of Lincoln's Inn.

I, A B of *etc.* DECLARE this to be my last will.

1. I hereby revoke all other wills and testamentary dispositions heretofore made by me.

Appointment of executors.

2. (a) In the event of my surviving the period of the present war I appoint my sons X and Y and my brother B (hereinafter called "my Trustees") to be executors and trustees of this my will.

(b) In the event of my dying during the period of the present war I appoint my said brother B and my brothers C and D to be executors and trustees of this my will and I DIRECT the said C and D to retire from the trusteeship of my will as soon after the termination of the present war as may be reasonably practicable and thereupon I DIRECT my Trustees to appoint my said sons X and Y to be trustees in their place to act jointly with the said B.

Specific legacies.

3. I give to my said sons W and X and to my son Z free of duty my clothes and wearing apparel my watches jewellery and personal ornaments absolutely to be divided equally between them as they may agree and in default of agreement as my said brother B shall direct.

Pecuniary legacies.

4. I give the following legacies [all free of duty (*b*)] namely [*here set out pecuniary legacies*].

(*a*) This form is intended to meet the case of a testator who is making his will during time of war and is providing for sons who are on active service. Where the testator is leaving an estate of some size it may be inadvisable to allow the sons to take their shares in full during the war, as this must result in increased liability to income tax and also possibly to additional death duties.

(*b*) If the legacies are large it may not be advisable to give them free of duty. To do so imposes a heavy burden on residue and in these days when all taxation is liable to be increased, it is not possible to foresee the possible cost to the estate of the exemption from duty.

General devise and bequest.

5. I devise and bequeath all the real and personal property whatsoever and wheresoever of or to which I shall be possessed or entitled at my death or over which I shall then have a general power of appointment or disposition by will [or of which I shall then be tenant in tail (*c*) in possession] except property otherwise disposed of by this my will or any codicil hereto unto my Trustees upon trust that my Trustees shall sell call in collect and convert into money such parts of my said real and personal property as shall not consist of money at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my Trustees that an earlier sale would be beneficial) with power to postpone the sale calling in or conversion of the whole or any part or parts of the said property including leaseholds or other property of a terminable hazardous or wasting nature during such period as they shall think proper and to retain the same or any part thereof in its actual form of investment without being responsible for loss and I DIRECT that the income of such of the same premises as for the time being shall remain unsold shall as well during the first year after my death as afterwards be applied as if the same were income arising from investments hereafter directed to be made of the proceeds of sale thereof and that no reversionary or other property not actually producing income shall be treated as producing income for the purposes of this my will.

Trust for sale and conversion.

Payment of debts.

6. My Trustees shall out of the moneys to arise from the sale calling in and conversion of or forming part of my said real and personal estate and my ready money pay my funeral and testamentary expenses (including all estate duty leviable at my death in respect of my residuary estate) and debts and the legacies given by this my will or any codicil hereto and all death duties and other moneys which are payable out of my general personal estate.

Trust for investment.

7. My Trustees shall at their discretion invest the residue of the said moneys in the names of my Trustees in or upon any investments authorised by law for the investment of trust

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(*c*) See Law of Property Act, 1925, s. 176.

moneys [*or*, in or upon any investments hereby authorised] with power to vary or transpose such investments for or into others of a nature hereby authorised.

8. My Trustees shall stand possessed of the residue of the said moneys and of the investments for the time being representing the same and of such part of my estate as shall for the time being remain unsold and unconverted all of which premises are hereinafter called "the trust fund" upon the trusts hereinafter declared.

Trusts during war period.

9. In the event (*d*) of my dying during the period of the present war my Trustees shall hold the trust fund during the period of the present war and for a period of one year thereafter or for a period of ten years from the date of my death whichever shall be the shorter period upon the following trusts that is to say:—

Gift of annuities.

(1) Upon trust to pay out of the income of the trust fund the following life annuities free of duty such respective annuities to begin from my death and to be payable by equal

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(*d*) Where sons are on war service, if the capital of the testator's estate is immediately given to them absolutely or a life interest in the whole income is conferred, should the estate be of any size it would seem that it may be subjected to heavy claims for death duties and income tax. These may be avoided to some extent if trusts on the lines of this clause are to operate during the war. In most cases, where a son is on active service he will not in fact enjoy himself the full benefit of income which is given to him, as a considerable part of it will go to the maintenance of his wife and children. In these circumstances, if an annuity only is given to the son for the duration of the war of a size which, when taken with his pay, will meet his personal requirements, should he die death duties will only be payable on the slice of the estate which produced the annuity. It must be remembered that section 14 of the Finance Act, 1900, as amended and extended by the Death Duties (Killed in War) Act, 1914, and subsequent Acts, does not afford a remission of all death duties in respect of persons killed while on active service during war, except in the case of estates not exceeding £5,000. Some death duties are leviable on larger estates. The amount of these duties depends on the size of the estate. In the case of estates of substance, it is advisable not to run the risk of a death of a beneficiary depleting the family property. The better plan is to give to the son an annuity of a definite amount. If his share is given to trustees on discretionary trusts for the benefit of himself, his wife and children, on his death his share would pass under section 1 of the Finance Act, 1894, and estate duty would be payable on the entirety notwithstanding that the son had in fact only been in receipt of a portion of the income: *Burrell and Kinnaird* v. *Att.-Gen.*, [1937] A. C. 286.

quarterly payments the first payment thereof to be made at the expiration of three calendar months from my death.

(a) To each of my said sons X and Y an annuity of £—— PROVIDED ALWAYS that in the event of either or both of my said sons ceasing to be engaged in war service then the annuity payable hereunder to such son shall be increased to an annuity of £——.

(b) To my said son Z an annuity of £—— PROVIDED ALWAYS that in the event of my said son Z becoming engaged in war service my Trustees shall pay to my said son in lieu of the said annuity of £—— such an annual sum as will together with any pay he may receive in respect of such war service give to him a gross income of £—— PROVIDED ALWAYS that the annuity payable hereunder shall not be less than the sum of £—— in any one year.

(c) To each of the respective wives of my said sons an annuity of £——.

Discretionary trusts for education of grandchildren.

(2) My Trustees (*e*) shall hold the residue of the income of the trust fund upon trust to pay or apply the same in whole or in part to or towards the maintenance education advancement or otherwise for the benefit of my grandchildren or remoter issue for the time being in existence as they in their absolute and uncontrolled discretion may think fit and I DIRECT my Trustees to accumulate any income which may not be so applied in the way of compound interest by investing the same and the resulting income thereof from time to time in any investments hereby authorised and they shall hold such investments as an accretion to the capital of the trust fund but my Trustees may at any time during the accumulation period apply the accumulations or any part thereof as if they were income arising in the then current year AND I HEREBY DECLARE that in deciding what proportion of the income of the trust fund is to be paid

Direction to accumulate.

(*e*) The advantage of giving the surplus income direct to the trustees upon trust for grandchildren is that income applied for the maintenance of grandchildren will be the grandchildren's income and, as it will not have been provided by a parent but by a grandparent, the provisions of the Finance Act, 1936, s. 21, will not apply and the income will not be aggregable with the father's income for income tax purposes and the children will be entitled to the usual income tax reliefs.

or applied in favour of my grandchildren or remoter issue under the powers contained in this clause my Trustees shall have regard not only to the immediate requirements of the object of the power but also to the fact that I wish so far as is reasonably practicable that the home life of my grandchildren may be continued notwithstanding the fact that my sons are absent on war service and my Trustees may make such payments in respect of rent or other matters which in time of peace would be paid by my sons as they may consider reasonably necessary to maintain homes for my grandchildren.

10. Subject to the provisions of clause 9 hereof my Trustees shall stand possessed of the trust fund and all accumulations of income thereof and the future income thereof in trust for such of my said sons X, Y and Z who shall be living at the expiration of one year after the end of the present war or at the end of a period of ten years from the date of my death whichever shall first happen and for the children or child who shall attain the age of twenty-one years or [being female] marry under that age then living of any then deceased son of mine if more than one in equal shares as tenants in common but so that the children of any deceased son of mine shall take equally between them as tenants in common only the share which their parent would have taken had he survived me and attained a vested interest PROVIDED ALWAYS that if any of my said sons die without attaining a vested interest in the trust fund leaving a widow him surviving my Trustees shall stand possessed of the income of one moiety of the share of the trust fund which the son so dying would have taken and shall hold the same upon protective trusts as defined in section 33 of the Trustee Act 1925 for the benefit of such widow during her life and widowhood.

Ultimate trusts.

11. If the trusts hereinbefore declared shall fail or determine my Trustees shall stand possessed of the trust fund and the income thereof in trust for my said brother B absolutely.

Hotchpot negatived.

12. I DECLARE that no son or grandchild of mine shall be required to bring into account any sum or sums paid or applied to or for the benefit of any child or grandchild of mine under the provisions of clause 9 (2) hereof.

13. [*Investment clauses if the power of investment is not to be limited to trustee investments.*] Investment clause.

14. In this my will the following expressions shall have the following meanings that is to say:— Definition clause.

(a) "my Trustees" shall where the context so requires or admits include the trustees or trustee for the time being hereof;

(b) the "period of the present war" shall be deemed to end on such date as His Majesty may by Order in Council declare to be the date on which the emergency which was the occasion of the emergency legislation of 1939 comes to an end;

(c) "war service" shall have the same meaning as in the Execution of Trusts (Emergency Provisions) Act 1939.

15. Any executor or trustee for the time being hereof being a solicitor or other person engaged in any profession or business shall be entitled to charge retain and be paid in priority to all other bequests hereby made all usual professional or other charges for business done by him or his firm in relation to the trusts hereof whether in the ordinary course of his profession or business or not and although not of a nature requiring the employment of a solicitor or other professional person.

IN WITNESS *etc.*

Form 25.

Will of a Bachelor making Provision for his Parents and for his Brothers and Sisters and their Issue and giving to Trustees Discretionary Powers to Meet the Needs of the Family during the War (*a*).

THIS is the last Will of me A of *etc.*

1. I APPOINT A of *etc.* and B of *etc.* (hereinafter called "my Trustees") to be the executors and trustees of this my Will Appointment of executors.

(*a*) It frequently happens that an unmarried child wishes that his or her parents shall have a first charge on the estate, and subject thereto that the property shall go to assist brothers and sisters and their issue. If the estate is of any size it is not very satisfactory to leave the entire income to the parents and to the survivor for life. In these days many persons live to a very advanced age and such a gift means, in effect, that

and I declare that the expression "my Trustees" shall include the said A and B and the survivor of them or other the trustees or trustee for the time being of this my Will except where such construction is precluded by the context.

Gift of residue.

2. I GIVE all my property both real and personal including property in which I have an entailed interest in possession to my Trustees Upon Trust to sell and call in the same with power to postpone such sale and calling in indefinitely without being responsible for loss And I direct that the income of the unsold part thereof for the time being shall be applied in the same manner as if it were income of investments of the proceeds of sale and calling in thereof and that no reversionary or other property not actually producing income shall be treated as producing income for the purposes of this my Will.

Trust to pay debts.

3. MY TRUSTEES shall out of the proceeds of such sale and calling in and out of my ready money pay my funeral and testamentary expenses and debts and the legacies given by this my Will or any codicil hereto.

Trust to invest.

4. MY TRUSTEES shall invest the residue of the said moneys in their names in or upon any investments for the time being authorised by law for the investment of trust funds [*or* in *set out any other modes of investment which are to be authorised*] PROVIDED that no investments hereby authorised shall be held

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the testator's brothers and sisters are unlikely to obtain any benefit from the gift while they are comparatively young and have themselves children to provide for and educate. This will is designed to meet the case where the testator expects his estate to provide a larger income than his parents will require, but at the same time he wishes whatever sum may be necessary to be used for their maintenance. During the continuance of the war and for some time afterwards it will be impossible to lay down in advance exactly what income will be required for the parents' maintenance. The probable rising cost of living makes it difficult to calculate what will be a reasonable annual sum to allow. Further, any estimate is liable to be thrown out by a further rise in taxation. In these circumstances the provision of an annuity of a fixed sum is not satisfactory. If the property is given to trustees on discretionary trusts they can apply such part as is necessary for the parents' maintenance and apply the remainder for the benefit of the brothers and sisters and their issue. There is the further advantage of giving to the trustees a wide discretion, should the parents become incapable of managing their affairs, the trustees can continue to apply the income for their benefit and there will be no need to have a receiver appointed to administer the income.

in bearer form or in such a form as to be transferable by delivery either with or without indorsement.

Discretionary trusts of residue.

5. My Trustees shall stand possessed of the residue of the said moneys and of the investments for the time being representing the same and of such part of my estate as shall for the time being remain unsold and unconverted (all which premises are hereinafter referred to as "the trust fund") upon trust to pay and apply the income thereof during the present lives of my father A and my mother B and the life of the survivor of them for the maintenance or support or otherwise for the benefit of all or any one or more exclusively of the other or others of the following persons namely my mother and my father and the survivor of them and my brothers and sisters their children and remoter issue (*b*) as my Trustees in their absolute discretion without being liable to account for the exercise of such discretion shall think fit.

Powers of trustees.

6. I hereby declare (*c*) but without prejudice to the aforesaid discretion conferred by clause 5 hereof on my Trustees that it is my wish that my Trustees shall regard my father and my mother and the survivor of them as the primary objects or object of the aforesaid discretionary trust and I desire them to pay the whole or such part of the trust income as may be necessary and proper for their happiness to my father or mother and to the survivor or to apply the same for their benefit and that of the survivor but it is not my wish as my parents grow older that a larger sum shall be spent on them or the survivor of them than is reasonably required I should like the

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(*b*) The power should include remoter issue. In view of the provisions of the Finance Act, 1936, s. 21, it is very desirable that if any income is to be paid to children, it should not take the form of a grant to the parents so as to be aggregated with the parents' income for income tax and surtax purposes. In view of the provisions of s. 21 it is no longer possible for a parent himself to settle income on a child so that it is not aggregated with his own income; but, if the property is settled on the child and is the child's own income, no question of aggregation can arise. Under trusts such as these in this will, the trustees can apply income for the benefit of the younger generation and it will never be brought into tax as part of the parents' income. This in many cases will result in a substantial saving of the family's total income tax payments.

(*c*) This clause is merely precatory and intended for the guidance of the trustees and as a statement of the testator's wishes.

balance of the income to be used in assisting the education and advancement in life of the children and remoter issue of my brothers and sisters so that the fact that my father or mother may still survive may not prevent the younger members of my family having the advantage of any provision my Trustees are able to make for them and I FURTHER DECLARE that any moneys which are to be applied for the maintenance education or benefit of any infant beneficiary may at the sole discretion of my Trustees be paid to his or her parent or guardian or any other person to be applied for these purposes or may be so applied by my Trustees.

Ultimate gift of residue.

7. AFTER THE death of the survivor of my father and mother my Trustees shall stand possessed of the capital and future income of the trust fund upon trust for all or any my brothers and sisters then living and the children then living who being male attain the age of twenty-one years or being female attain that age or marry of any then deceased brother or sister of mine in equal shares but so that the children of any deceased brother or sister of mine shall take equally between them only the shares which their parent would have taken if he or she had attained a vested interest and I DECLARE THAT no beneficiary shall be required to bring into hotchpot or to account for any sum or sums paid out of the income of the trust fund to or for the benefit of such beneficiary or to or for the benefit of his or her parent or issue.

Power of advancement.

8. MY TRUSTEES may at any time or times during the lifetime of my father and mother and the survivor of them if my Trustees in their sole discretion consider the exercise of the power hereby conferred will not prejudice my said father or mother raise any part or parts not exceeding in the whole a moiety of the then expectant presumptive or vested share of any of my brothers or sisters or their issue in the trust fund and may pay and apply the same for the benefit of any child or children or remoter issue of such brother or sister in such manner as my Trustees think fit PROVIDED ALWAYS that the power hereby conferred shall not be exercised during the lifetime of any brother or sister of mine out of whose share the advancement

is to be made without the consent in writing of such brother or sister.

Power during the war to raise money for maintenance.

9. My Trustees may at any time or times until one year after the date on which there shall be an Order in Council declaring the present war at an end at their sole discretion raise any sum or sums by sale or mortgage of the trust fund and pay or apply the sums so raised for the maintenance of my father and mother and the survivor of them Provided always and I hereby declare that the power hereby conferred is only to be used in case of exceptional necessity and my trustees are to use their best endeavours in the event of there being any great reduction in the income of the trust fund or in my present income to see that there is a corresponding reduction in the expenditure of my family and they are not to have recourse to the capital of the trust fund habitually to relieve income deficiencies.

10. [*Investment clause if required.*]

11. [*Power to professional trustee to charge.*]

In witness *etc.*

Form 26.

Appropriation and Assent in Favour of the Widow of an Intestate in Part Satisfaction of Her Statutory Right to £1,000 and Interest (*a*).

This assent is made the —— day of —— between A of Parties.

(*a*) The stamp should be adjudicated. In the case of an appropriation in favour of a legatee, unless the appropriation is made pursuant to an express power in the will not requiring the legatee's consent, *ad valorem* stamp duty is charged on the deed of appropriation: *Dawson* v. *Inland Revenue Commissioners*, [1905] 2 I. R. 69. This is on the ground that the transaction is in fact a sale to the legatee: *Re Beverly*, [1901] 1 Ch. 681. It is not entirely clear that this reasoning applies where the appropriation is to a surviving spouse in satisfaction, or part satisfaction, of the £1,000 payable under section 46 of the Administration of Estates Act, 1925. The Commissioners of Inland Revenue, however, contend that it does. Until there has been a judicial decision on the matter the stamp must therefore be adjudicated. Where the total value of the estate is under £1,000 and a surviving spouse elects to take the entirety unconverted, the Commissioners have agreed that no stamp duty is payable.

This form is published as several readers have expressed a desire for a form of appropriation and assent to give effect to an appropriation of land

etc. and B of *etc.* (hereinafter called "the Administrators") of the one part and X of *etc.* of the other part

Recitals: Death of intestate;

WHEREAS Z (hereinafter called "the Intestate") died on the —— day of —— intestate being the estate owner at the time of his death in respect of the fee simple of the property known as Y house situate at —— in the county of —— and more particularly described in the First Schedule hereto [subject to the incumbrances more particularly described in the Second Schedule hereto but otherwise] free from incumbrances and letters of administration to his estate were on the —— day of —— duly granted out of the Principal [*or* —— District] Probate Registry of the High Court of Justice to the Administrators

AND WHEREAS the Intestate left him surviving the said X his wife

Valuation of property;

AND WHEREAS a duly qualified valuer has fixed the value of the said property at £——

Agreement to appropriate.

AND WHEREAS the Administrators have agreed with the said X to appropriate to her the said property known as Y house at the value of £—— in part satisfaction of the net sum of £1,000 to which she is entitled under the Administration of Estates Act 1925 as the surviving wife of the Intestate

NOW THIS DEED WITNESSETH [*or* NOW (*b*) IT IS HEREBY DECLARED] as follows:—

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in favour of a surviving spouse in satisfaction of the statutory legacy of £1,000. Such a method of appropriation is expressly authorised by section 41 (3) of the Administration of Estates Act, 1925. It seems, however, that this method of effecting the transaction is not really desirable, as it brings the equitable title of the surviving spouse on to the legal title. The better plan is to effect the appropriation and the assent by two separate documents. By the first, the administrators should, with the consent of the spouse, appropriate the property in question. This document will bear the *ad valorem* stamp. When it has been duly completed, the executors can then by a simple assent, containing no recitals of beneficial interests, vest the property in the spouse. Such an assent, if under hand only, would require no stamp, if under seal would require a 10s. stamp. This procedure has the merit of keeping the equitable title wholly distinct from the legal title. Where, however, the parties wish the transaction to be carried through by one document the above form is effective.

This form operates under sections 36 and 41 of the Administration of Estates Act, 1925.

(*b*) If the assent is not under seal this form should be used.

1. The Administrators as administrators of the Intestate in exercise of the power of appropriation conferred on them by section 41 of the Administration of Estates Act 1925 and in exercise of every other power enabling them in this behalf and with the consent of the said (*c*) X (testified by her execution of these presents [*or* by (*b*) her signature appended hereto]) hereby appropriate to the said X ALL THAT property known as Y house situate at —— in the county of —— as the same is more particularly described in the First Schedule hereto [subject to the incumbrances specified in the Second Schedule hereto] in satisfaction of the sum of £—— part of the said sum of £1,000 to which the said X is entitled under the said Act as aforesaid. Appropriation.

2. For the purpose of giving effect to the aforesaid appropriation the Administrators as personal representatives of the Intestate hereby assent to the vesting in the said X of the said property known as Y house for an estate in fee simple [subject to the said incumbrances]. Assent.

3. The (*d*) Administrators HEREBY DECLARE that they have not previously hereto given or made any assent or conveyance in respect of any legal estate in the said property known as Y house.

4. The Administrators hereby acknowledge the right of the said X to the production of the grant of administration to the estate of the Intestate (the possession of which is retained by them) and to delivery of copies thereof. Acknowledgment as to grant.

IN WITNESS *etc.*

THE FIRST SCHEDULE.

(*To contain a description of the property.*)

[THE SECOND SCHEDULE.

(*To contain particulars of any incumbrances affecting the property.*)]

(*c*) Under section 41 (1) (ii) (a) of the Administration of Estates Act, 1925, the consent of the wife is necessary to the appropriation and can best be given by her executing the assent. A purchaser, however, is not concerned to see that such assent is in fact given: sub-section (7).

(*d*) This clause is not strictly necessary. Its insertion secures the benefit of section 36 (6) of the Administration of Estates Act, 1925, and, on a sale of the property, may be of value.

Form 27.

Heads of Proposed Marriage Settlement of Personal Estate (*a*).

Drafted by A. H. Withers, of Lincoln's Inn.

1. Property to be settled.

Husband's fund. Investments of husband (or his parents).
Reversionary interests of husband.
Policies on husband's life.
Capital sums covenanted to be paid by parent.

Wife's fund. Investments of wife (or her parents).
Reversionary interests of wife.
Other and after-acquired property with exception of —— (*b*).
Capital sums covenanted to be paid by parent.

Annuity of £—— to be paid by —— during life of —— and to be held as income of the —— fund.

2. Trusts in favour of spouses (*c*).

Income of husband's fund to husband for life then to wife for life.

Income of wife's fund to wife for life then to husband for life.

(*a*) The object of this precedent is to call attention to various matters to be considered on the negotiation of a marriage settlement. Whether any particular provision is required or desirable depends on the circumstances and the views of the parties. If there is only an agreement for a settlement, the agreement can be in the full form set out in Key and Elphinstone's Precedents (13th ed.), vol. 2, p. 619 (which includes an important power to vary) and the heads when agreed can go in the schedule thereto.

(*b*) The exceptions should be set out fully—see 2 K. & E. at p. 559. Is there to be any limit to the total value of the property to be brought in by the wife?

(*c*) Is either life interest to be protected under s. 33 of the Trustee Act, 1925, or otherwise? Is the reversionary life interest of the survivor in the deceased's fund to be reduced or lost on remarriage, and is the existence or continued existence of a child of the marriage to make any difference in the case of such remarriage? This is important where the wife's parents are providing an annuity.

3. Trusts in favour of issue of marriage.

Subject to prior trusts capital of both funds to be held in trust for issue of marriage as husband and wife by deed jointly appoint (*d*) and subject thereto as the survivor of them by deed or will appoints and subject thereto for the children of the marriage who attain the age of twenty-one years or being female marry and if more than one equally with usual hotchpot and advancement clauses.

4. Power of appointment on future marriage (*e*).

The survivor of the spouses may on or after remarriage resettle his or her fund (*f*) as from his or her death on the spouse and issue of a future marriage or marriages with these restrictions:—

(1) The total amount appointed of such fund shall not exceed one-fourth thereof if there are three children of the now intended marriage or one-third if there are only two such children or one-half if there is only one such child.

(2) The issue of the intended marriage shall not together take less than they would have taken if such fund had been divided equally amongst all the children of such survivor.

(3) The spouse of a future marriage shall not take more than a life interest in income.

4) "Child" and "issue" in this paragraph do not include a person who dies under the age of twenty-one years and (if female) without marrying.

(*d*) Sometimes each spouse retains the sole power of appointment over his or her fund. Then is the hotchpot clause to be applied to each fund separately or to both funds together as one fund?

(*e*) This power is most important where a spouse is or may be settling the whole or the greater part of his or her property.

(*f*) Is this power to extend to property settled by a parent of the survivor?

5. Ultimate trusts (*g*). Husband's fund for the husband. Wife's fund for the wife (*h*).

6. If there is no child of the marriage and the wife attains the age of [sixty] years either spouse may require his or her fund to be invested in the purchase of an annuity for the joint lives and the life of the survivor of them to be held as income of such fund (*i*).

7. As to policies on life of husband.

The trustees may sell or surrender a policy for cash or a fully-paid policy and maintain a policy out of the capital of the husband's fund or the income or capital of the wife's fund; the husband may apply bonuses in reduction of premiums or redeem any policy at its face value.

8. Investments.

The range of investment is to be ——.

The trustees may buy freehold land and build or improve buildings (*k*).

The trustees can lend any money to the husband with or without security.

Consent of husband and wife and of the survivor of them to be required to all investments and changes of investments (*l*).

9. The power to appoint new trustees is to be vested in the spouses and the survivor of them (*m*).

(*g*) Are different trusts to be declared of property settled by a parent of either spouse?

(*h*) Is the wife to be prevented during coverture from appointing or assigning her reversionary interest by deed? If so, see the form in 2 K. & E. at p. 525–6.

(*i*) Some such provision may prove useful in old age.

(*k*) If leaseholds are purchased, are covering capital redemption policies to be obtained and maintained, and what is to be the minimum term unexpired of the lease?

(*l*) If a spouse loses his or her life interest in the other's fund, is his or her consent to be required to investments, etc., of that fund?

(*m*) Sometimes each spouse only has power to fill the place of the trustees originally nominated by him or her.

10. Remuneration of trustees.

The usual provision enabling professional trustees to charge (*n*).

It may be worth while adding a provision enabling a corporation appointed to be a trustee to charge for its services.

11. Special points to be considered:—

(A) Is the wife an infant?

(B) Is the settlement to be governed by English law?

(C) Is there to be any power for either spouse to withdraw capital for any purpose?

(D) Who is to pay for the stamp and legal costs?

Form 28.

Legacy to such Charities as Trustees or Executors shall Select (*a*).

I give the sum of £—— [free of duty] to or for such charitable institution or institutions or other charitable object or objects in England as my Trustees [*or*, acting executors or

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(*n*) Unless an express power is inserted authorising a trust corporation to charge for its services, should it ever become desirable to appoint such a corporation, it will be necessary to apply to the Court under s. 42 of the Trustee Act, 1925, to make the appointment and to sanction payment of the corporation's fees: *Forster* v. *Williams Deacon's Bank, Ltd.*, [1935] 1 Ch. 359. The ordinary clause authorising a professional trustee to charge does not enable a trust corporation to charge fees: *Re Cooper, Le Neve-Foster* v. *National Provincial Bank, Ltd.*, 160 L. T. 453.

(*a*) This form should be substituted for clause 14 of Form 7, Vol. 21, p. 170. In this form as originally drafted the legacy was given for "such purposes of a charitable or benevolent nature" as the trustees should select. The late editor, Mr. Norman H. Oldham, in correcting the proofs overlooked the fact that *or* had been printed in error for *and* in this clause. It is clear that a gift for charitable *and* benevolent objects is good: *Re Best*, [1904] 2 Ch. 354. It is equally clear that a gift to charitable *or* benevolent objects fails for uncertainty: *Hunter* v. *Att.-Gen.*, [1899] A. C. 309, 323; *Re Horrocks, Taylor* v. *Kershaw*, [1939] P. 198. In these circumstances it seems advisable, unless the testator is very set on the use of the word "benevolent", to omit it altogether, so that no question can arise as to the gift being solely for charitable purposes. The power of selection must not extend to indefinite and non-charitable objects: *Re Clarke, Bracey* v. *Royal National Lifeboat Institution*, [1923] 2 Ch. 407.

executor] may in their or his absolute discretion select (*b*) and to be paid to or for such institutions or objects if more than one in such proportions as my Trustees [*or*, executor or executors] may think proper.

Form 29.

Appointment by a Limited Company in Voluntary Liquidation of New Trustees of Property Vested in the Company upon the Statutory Trusts (*a*).

This form is based on a draft by A. H. Withers, of Lincoln's Inn.

Parties. THIS APPOINTMENT is made the —— day of —— 19— BETWEEN the A Corporation Limited in liquidation whose regis-

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(*b*) It must be made clear whether the power of selection is, as in this gift, annexed to the office of trustee or executor or is to be exercised only by named trustees or executors whether they prove or not, and, on their failing to exercise the power of selection, is to determine: *Crawford* v. *Forshaw*, [1891] 2 Ch. 261; *Re Smith, Eastick* v. *Smith*, [1904] 1 Ch. 139; *Re Willis, Shaw* v. *Willis*, [1921] 1 Ch. 44.

(*a*) Stamp 10s. This form is intended to meet the case where a limited company in liquidation desires to appoint new trustees of property vested in itself as trustee. Trust corporations are not the only companies to-day holding land as trustees. In many cases a limited company has had conveyed to it property which is held on trust for the benefit of its employees or of some other persons. If the company goes into liquidation, it becomes necessary for it to divest itself of such property. The Companies Act, 1929, makes no express provision for dealing with trust property vested in a company in liquidation, and the question arises whether the liquidator of the company has power to appoint new trustees. The only statutory power which may give such authority to a liquidator is that conferred by s. 191 (2) which provides that "the liquidator in a winding up by the Court shall have power— . . . (h) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets". Under s. 248 the liquidator may, in the case of a member's voluntary winding up, exercise with the sanction of the Court, certain specified powers conferred on a liquidator in a winding up by the Court, and without such sanction may exercise any of the other powers, which include the power conferred by s. 191 (2) (h), given to a liquidator in a winding up by the Court. The wording of clause (h) is wide and it is arguable that the appointment of a new trustee is a thing "necessary for winding up the affairs of the company" and within the powers of the liquidator. The position is

tered office is situate at *etc.* (hereinafter called "the Corporation") of the first part B of *etc.* (hereinafter called "the Liquidator") of the second part and C Limited whose registered office is situate at *etc.* (hereinafter called "the New Trustee") of the third part

Recitals: Conveyance to original trustee;

WHEREAS by a conveyance (hereinafter called "the principal conveyance") dated the —— day of —— 1921 and made between D of the one part and the Corporation of the other part the land together with the buildings thereon more particularly described in the Schedule hereto was by way of sale conveyed to the Corporation in fee simple free from incumbrances

Declaration of trust;

AND WHEREAS by an Indenture also dated the —— day of —— 1921 and made between the Corporation of the one part and U V W X Y and Z (hereinafter called "the Partners") of the other part the Corporation declared that it held all the land conveyed by the principal conveyance (hereinafter called "the trust property") upon trust for the partnership firm of Z & Co. (of which the Partners were members) as part of the capital and assets thereof

AND WHEREAS at the end of the year 1925 the trust property was still held in trust for the said partnership firm of which there were then six members

Operation of transitional provisions;

AND WHEREAS under the circumstances (*b*) aforesaid the trust property has since the year 1925 been held by the Corporation upon the statutory trusts applicable under the Law of Property Act 1925 to lands which at the end of the year 1925 were held at law or in equity in undivided shares vested in possession

Voluntary winding up of trustee company;

AND WHEREAS at a general meeting of the Corporation held

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not, however, entirely clear and it seems safer to proceed under s. 232 (2) of the Companies Act, 1929. This section provides that: "On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof." If the liquidator duly authorises the directors to exercise the statutory power contained in the Trustee Act, 1925, s. 36, to appoint new trustees, the appointment can be made by the company and no question of its validity can arise.

(*b*) See *Re Fuller's Contract*, [1933] Ch. 652.

on the —— day of —— 19— a special resolution was duly passed to the effect that the Corporation be wound up voluntarily and a statutory declaration as to solvency was made by the directors of the Corporation and filed with the Registrar of Companies as provided by section 230 of the Companies Act 1929

Appointment of liquidator;

AND WHEREAS it was further resolved at the said meeting that the Liquidator be and he was accordingly appointed liquidator for the purpose of such winding-up

AND WHEREAS the Corporation (with the consent of the Liquidator) is desirous of being discharged from the aforesaid statutory trusts and of appointing the New Trustee to be a trustee of such trusts in place of the Corporation

Witnesseth.

NOW THIS APPOINTMENT WITNESSETH as follows:—

1. The Liquidator (*c*) hereby sanctions the continuance by the directors of the Corporation of all such of their powers as may be necessary for enabling the Corporation to retire from the aforesaid statutory trusts and to make the appointment hereinafter contained but such sanction is limited to the appointment hereinafter contained.

2. The Corporation in exercise of the statutory power in this behalf hereby appoints the New Trustee to be a trustee in place of the Corporation of the aforesaid statutory trusts applicable to the trust property.

3. The New Trustee agrees to act as such trustee as aforesaid.

IN WITNESS *etc.* (*d*).

THE SCHEDULE.

[*To contain a description of the property.*]

(*c*) See s. 232 (2) of the Companies Act, 1929. If the appointment is made by a company, which is being wound up by the Court, the controlling section is s. 241 (2), and permission to the directors to make the appointment must be given by the committee of inspection, and, if there is no such committee, by the creditors.

(*d*) All parties must execute this deed, the company executing under the power conferred by s. 74 of the Law of Property Act, 1925, as if there was no liquidation.

Form 30.

Conveyance by a Company in Liquidation, the Liquidator not being a Party (*a*).

Based on a Form drafted by A. H. Withers, of Lincoln's Inn.

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A Ltd. in liquidation (hereinafter called "the Company") of the one part and B, Ltd., whose registered office is at *etc.* (hereinafter called "the Purchasers") of the other part — Parties.

WHEREAS the premises hereby conveyed are charged with the payment to the Purchasers of the moneys secured by the legal charge and debentures specified in the First Schedule hereto which legal charge and debentures are hereinafter referred to as the scheduled mortgages — Recitals: mortgage;

AND WHEREAS the Company is seised of the said premises for a legal estate in fee simple in possession subject to the scheduled mortgages but otherwise free from incumbrances and holds the same for its own sole use and benefit — estate of vendor;

AND WHEREAS by an Order of the Chancery Division of the High Court of Justice made by Mr. Justice —— on the —— day of —— on the hearing of a petition in the matter of the Companies Act 1929 and of the Company it was ordered that the Company be wound up by the Court under the provisions of the said Act — order for winding up;

AND WHEREAS X (hereinafter called "the Liquidator") is the senior official receiver attached to the Court for bankruptcy purposes and is as such the liquidator of the Company no other liquidator having been appointed in the winding up of the Company — appointment of liquidator;

(*a*) Stamp *ad valorem* on the aggregate of the consideration paid and the amount of the mortgage debt released: see s. 57 of the Stamp Act, 1891. The stamp should be adjudicated. Generally on a sale by a company in liquidation the liquidator joins in the conveyance. Recently some liquidators have refused to be joined as a party and this form is to meet the case of such refusal. The liquidator is not a necessary party except when in a winding-up by the Court he has obtained a vesting order under s. 190 of the Companies Act, 1929.

amount due on mortgage;

AND WHEREAS the total amount now owing to the Purchasers on the security of the scheduled mortgages exceeds £A

agreement for sale;

AND WHEREAS the Company (acting by the liquidator (*b*)) has agreed with the Purchasers for the absolute sale to the Purchasers of the premises hereby conveyed in consideration of the release of the sum of £A by the Purchasers hereinafter contained and of the payment by the Purchasers to the Company of the sum of £B making with the said sum of £A so owing on the security of the scheduled mortgages as aforesaid the sum of £C

agreement to keep the mortgage debt on foot.

AND WHEREAS it was part of the said agreement for sale that the said sum of £A so owing on the security aforesaid should be kept on foot as a charge on the said premises hereby conveyed for the benefit of the Purchasers and their assigns in manner hereinafter appearing

NOW THIS CONVEYANCE WITNESSETH and it is HEREBY AGREED AND DECLARED as follows:—

Consideration.

1. THIS Conveyance is executed in pursuance of the aforesaid agreement for sale and in consideration (so far as regards the company) of the sum of £B now paid by the Purchasers to the Liquidator (*c*) on behalf of the Company (the payment whereof to the Liquidator the Company hereby acknowledges and admits) and of the release by the Purchasers hereinafter contained.

Conveyance.

2. THE Company (acting by the Liquidator) hereby conveys (*d*) and releases unto the Purchasers ALL AND SINGULAR the premises which are comprised in or expressed to be conveyed by the deeds specified in the Second Schedule hereto TO HOLD the same UNTO the Purchasers in fee simple subject to the said sum of £A secured by the scheduled mortgages and to the future interest thereon but FREED AND DISCHARGED from all right or equity of redemption and from all claims and demands under or in respect of the scheduled mortgages respectively or any of them.

(*b*) In the case of a winding-up by the Court the contract of sale must be entered into by the company acting by the liquidator: see s. 191 (2) (a) of the Companies Act, 1929.

(*c*) The purchase moneys must be paid to the liquidator.

(*d*) It is not usual for a company that is being wound up to give covenants for title.

3. The Purchasers hereby release the Company from the sum of £A being part of the moneys secured by the scheduled mortgages respectively. Release.

4. The charge created by the scheduled mortgages respectively to the extent of the said sum of £A and the interest thereon (but no further) shall not merge in the fee simple of the premises hereinbefore conveyed but shall be kept on foot as a charge thereon so as to protect the Purchasers and their assigns against all mesne incumbrances charges and estates if any such there be and all moneys in excess of the said sum of £A secured by the scheduled mortgages respectively shall cease to be a charge on the premises hereby conveyed.

5. [*Statement as to value if required.*]

In witness whereof X (*e*) as such liquidator as aforesaid hath caused the common seal of the Company to be hereunto affixed and the other parties hereto have hereunto set their hands and seals the day and year first above written.

The First Schedule above referred to.

[*Particulars of the documents which in the above-written deed are referred to as the scheduled mortgages.*]

No.	Date of Document.	Parties to Document.	Nature of Document.

The Second Schedule above referred to.

[*Particulars of the documents under which the Company acquired the lands conveyed by the above-written deeds.*]

No.	Date of Document.	Parties to Document.	Nature of Document.

(*e*) The liquidator must affix the seal of the company, and that he has done this must be made plain in the attestation clause.

Form 31.

Mortgage of a Block of Flats where the Mortgagor is under an Obligation to Provide Tenants with Heating, Hot Water and other Services, giving to the Mortgagee Power on Going into Possession to Continue such Services. Provision for an Application under Section 84 of the Law of Property Act, 1925, should Objection be Taken to the User of the Premises as Flats (*a*).

Drafted by B. A. Bicknell, of Lincoln's Inn.

Parties. THIS LEGAL CHARGE is made the —— day of —— 19— BETWEEN X Co. Ltd. whose registered office is situate at *etc.* (hereinafter called "the Borrowers" which expression shall also include the estate owner or estate owners for the time being of the fee simple of the mortgaged premises) of the one part and B Co. Ltd. whose registered office is situate at *etc.* (hereinafter called "the Mortgagees") of the other part

Recitals. WHEREAS the Borrowers are the estate owners in respect of the fee simple of the property known as Z House situate at —— in the County of —— more particularly described in the First Schedule hereto and hereby charged subject if and so far as the same are still enforceable to the restrictive (*b*) covenants contained in the several indentures specified in the Second Schedule hereto but otherwise free from incumbrances

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(*a*) Stamp: 2s. 6d. for every £100 and also for every fractional part of £100 secured.

(*b*) It frequently happens that, although property to the knowledge of the owner is subject to restrictions which may still be enforceable, he develops the property in breach of such restrictions, being of opinion that, owing to changes in the character of the neighbourhood or for some other reason the restrictions are no longer enforceable. Formerly, if a mortgagee was prepared to advance money on the security of such property, he had to accept the risks which the owner had taken; now, having regard to the provisions of section 84 of the Law of Property Act, 1925, it is possible in proper cases to have such restrictions discharged or modified. Where a mortgagee does not consider it proper to insist on the mortgagor having recourse to this section before advancing the money, the mortgage should contain provisions which will enable him to require the machinery of section 84 to be put into operation should any persons in fact seek to enforce the restrictions to the detriment of the security.

AND WHEREAS Z House consists of some eighty or more flats and the Borrowers have let or are proposing to let such flats to divers tenants and under the terms of the respective tenancies the Borrowers have undertaken or are proposing to undertake to supply to such tenants certain services including a supply of hot water and central heating

AND WHEREAS the Mortgagees have agreed with the Borrowers to lend to them the sum of £—— upon having the repayment thereof with interest thereon at the rate hereinafter mentioned secured in manner hereinafter appearing

NOW THIS DEED WITNESSETH in consideration of the sum of £—— now paid to the Borrowers by the Mortgagees the receipt whereof the Borrowers hereby acknowledge as follows:— Witnesseth.

1. The Borrowers hereby covenant with the Mortgagees to pay to the Mortgagees the sum of £—— with interest thereon in the meantime at the rate of £—— per cent. per annum by equal half-yearly instalments of principal and interest combined of £—— each (less income tax at the rate for the time being in force on such part thereof as shall represent interest) such instalments to be paid on the —— day of —— and the —— day of —— in each year the first of such instalments to be paid on the —— day of —— next (*c*). Covenant for payment.

2. The Borrowers as beneficial owners hereby charge by way of legal mortgage ALL AND SINGULAR the property known as Z House situate at —— in the County of —— all which premises are more particularly described in the First Schedule hereto with payment to the Mortgagees of the principal moneys interest and other moneys hereby covenanted to be paid by the Borrowers subject as to the parts thereof respectively affected thereby to the said leases and tenancy agreements so far as the same may be now subsisting (*d*). Legal charge.

(*c*) If the borrowers covenant to pay by instalments and no further provisions are inserted conferring a right to repay all or a part of the capital at an earlier date, the borrowers will be precluded from redeeming at an earlier date: *Knightsbridge Estates Trust, Ltd.* v. *Byrne*, [1939] Ch. 441. The Court of Appeal held in the above case that postponement of redemption for forty years in the circumstances of that case did not constitute a clog on the equity of redemption.

(*d*) See section 65 (2) of the Law of Property Act, 1925.

3. The Borrowers hereby covenant with the Mortgagees and IT IS HEREBY AGREED AND DECLARED as follows:—

Power to pay off principal;

(i) The Borrowers (*e*) may at any time or times after the expiration of ten years from the date hereof upon giving at least six calendar months' notice in writing to the Mortgagees or their solicitor of their intention so to do pay off all or any part of the principal moneys for the time being owing on this security so that not less than £—— be so paid off at any one time and that upon any payment of principal the interest on the whole principal sum for the time being owing be fully paid and that such partial payment by anticipation shall not interfere with the payment in regular course of the instalments of principal subsequently payable pursuant to the provision in that behalf hereinbefore contained, but shall only have the effect of accelerating the ultimate payment of the moneys remaining owing in this security;

Covenant to observe covenants of lease.

(ii) The Borrowers will during the continuance of their security observe and perform all the covenants and agreements on the part of the Borrowers to be observed and performed in every lease or tenancy agreement for the time being affecting the mortgaged premises or any part thereof and will instal (if not already installed) and maintain an efficient hot water and heating system of such a size and character as will provide adequate heating and hot water for the said flats and also will perform and supply all other services and amenities which the Borrowers either expressly or by implication have undertaken to perform or to supply for the benefit of the tenants of the mortgaged premises and also will maintain all those portions of the mortgaged premises not for the time being let to the tenants but used by them including passages staircases lifts (if any) cleaned and maintained to the standard commonly required in flats of the character of those in the mortgaged premises and will also keep the garden and grounds of the premises in good order and condition AND FURTHER that the Borrowers will indemnify and keep indemnified the Mortgagees

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(*e*) If this clause is not inserted the borrower will be precluded from redeeming otherwise than by the agreed instalments.

against every such covenant agreement and condition as aforesaid and against all actions proceedings costs charges claims and demands in respect thereof And that all moneys paid by the Mortgagees and the costs charges and expenses incurred by them in the observance and performance of the said covenants agreements and conditions shall be deemed to be properly paid and incurred by them;

Covenant to repair and insure.

(iii) The Borrowers will during the continuance of this security keep all buildings and property now or for the time being comprised in or subject to this security in a good and substantial state of repair and insured against loss or damage by fire in the full value thereof in the —— Insurance Office or with underwriters of repute to be approved of in writing from time to time by the Mortgagees in the name or names of the Mortgagees or their assigns and will duly and punctually pay all premiums and other moneys necessary for effecting and keeping up such insurance immediately on the same becoming due or within one week thereafter and will on demand produce to the Mortgagees the policy or policies of such insurance and the receipt for or other sufficient evidence of every such payment And that if default shall at any time be made by the Borrowers in keeping the said premises or any part thereof in good and substantial repair or in effecting or keeping up such insurance as aforesaid or in producing any such policy or receipt or evidence to the Mortgagees on demand the Mortgagees may repair and keep the said premises or any part thereof in repair (with power to enter upon the mortgaged premises for that purpose) or may insure and keep the same insured in any sum not exceeding £—— And that all moneys expended by the Mortgagees under this provision shall be deemed to be properly paid by them;

Covenant to keep accounts.

(iv) The Borrowers will during the continuance of this security keep proper books of account of all rent and other receipts, payments, and outgoings in respect of the mortgaged premises and will at any time allow the Mortgagees to inspect and make copies of and extracts from the same and will on the —— day of —— next and on every subsequent —— day of —— or within twenty-one days thereafter produce the accounts for the then preceding year to the Mortgagees together with a statement

on behalf of the Borrowers by a director or other responsible officer of the Borrowers showing what portions of the mortgaged premises are let on such —— day of —— and the names of the tenants and the rents thereof and will give satisfactory evidence as to the correctness of such accounts and statement and in particular will (if required) verify the same by statutory declaration;

Covenant to appoint a manager and servants.

(v) That the Borrowers will appoint and will at all times during the continuance of this security employ a manager and such other agents and servants as may be necessary for maintaining the mortgaged property in good order and condition and will duly pay the salary and wages of such manager and agents and servants and that if the Borrowers shall refuse or neglect to make the payments aforesaid or any of them the Mortgagees may pay the same and all moneys so paid by them shall be deemed to be properly paid;

Power to have buildings surveyed.

(vi) That for the purpose of ascertaining whether the said buildings are in repair pursuant to the covenant in that behalf hereinbefore contained the Mortgagees may from time to time during the continuance of this security cause the said buildings to be surveyed by a competent surveyor to be appointed by the Mortgagees upon such terms as to remuneration and otherwise as the Mortgagees shall think proper and may pay such remuneration to such surveyor And that any surveyor appointed under this provision may enter upon the mortgaged premises for the purpose of making his survey and his certificate shall be conclusive as to the adequacy of the repair of the said buildings And that all moneys paid by the Mortgagees under this provision shall be deemed to be properly paid by them;

Power to value premises;

(vii) The Mortgagees may in the year —— and in every subsequent fifth year cause the mortgaged premises to be inspected and valued by a valuer to be appointed by the Mortgagees on such terms as to remuneration and otherwise as the Mortgagees may think fit and may pay such remuneration to the said valuer And all moneys paid by the Mortgagees under this provision shall be deemed to be properly paid by them;

(viii) The Borrowers shall not exercise the statutory or any

other powers (*f*) of leasing and agreeing to lease or agree to accept a surrender of a lease for any term exceeding three years without the consent in writing of the Mortgagees which need not be expressed in such lease or surrender or agreement; Restriction on the Borrowers' powers of leasing.

(ix) If any legal proceedings against the Borrowers are threatened to enforce any restrictive covenants or provisions which affect or may affect the mortgaged premises or any part thereof the Borrowers will forthwith inform the Mortgagees thereof and will if the Mortgagees in writing so require immediately take all proper proceedings under section 84 of the Law of Property Act 1925 to have such restrictive covenants or provisions declared to be unenforceable or to have such restrictions discharged or modified so that the erection of flats on the premises and the user thereof for the purpose of flats may be sanctioned and will pay all compensation moneys and other costs and expenses payable under or by reason of any such application under section 84 as aforesaid. Application under s. 84 of the Law of Property Act, 1925.

4. IT IS HEREBY FURTHER AGREED AND DECLARED as follows:—

(1) If the Borrowers shall on every half-yearly day on which an instalment of principal and interest is hereby made payable or within fourteen days after each of such days pay to the Mortgagees the instalment of principal moneys and interest then payable and if the power of sale applicable hereto (which notwithstanding the present provision and without prejudice thereto shall be deemed to arise on the —— day of ——) shall not have become exercisable then the Mortgagees shall not before the —— day of —— call in the said sum of £—— or any part thereof.

(2) The power of sale applicable hereto shall become immediately exercisable by the Mortgagees without the necessity of giving any notice in that behalf to the Borrowers Events in which the power of sale shall be exercisable:

(*f*) These words are necessary, as it was held in *Iron Trades Employers' Insurance Association* v. *Union of Land and House Investors, Ltd.*, [1937] Ch. 313, that a restriction on a mortgagor's statutory power of leasing did not preclude him from exercising his common law power and granting leases. Such leases would not bind the mortgagee, but their existence would necessarily hamper him in dealing with the property and it is desirable that the mortgagor should grant no leases for a longer period than three years.

at any time or times after the happening of any or either of the events following, that is to say:—

On Bankruptcy;

(i) If the Borrowers shall become bankrupt or if an order shall be made or an effective resolution shall be passed for the winding-up of the Borrowers except for the purpose of amalgamation or reconstruction or if a receiver shall be appointed for the mortgaged premises;

On interest falling in arrears;

(ii) If any instalment of principal moneys or the interest on any principal moneys for the time being unpaid or any part thereof respectively shall not be paid within fourteen days after the day appointed for the payment thereof;

On breach of covenant.

(iii) If the Borrowers shall break or fail to observe any of the covenants or provisions on their part herein contained or shall give or execute a bill of sale over any of their personal chattels or effects or a warrant of attorney to enter judgment against them or shall give any promissory note or accept or endorse any bill of exchange (except in the ordinary course of business) or suffer any of their goods to be taken in execution or under a distress for rent, rates or taxes, or shall without the written consent of the Mortgagees cease to carry on the said business of letting flats on the mortgaged premises.

Powers of the mortgagees;

(3) If the Mortgagees shall enter into possession of the mortgaged property or any part thereof or shall appoint a receiver thereof then:—

To lease;

(i) The Mortgagees may grant any lease or tenancy agreement of any part of the mortgaged property upon such terms and conditions as they may think fit with regard to the use by the tenants and others authorised by them of any lifts radiators stairs corridors lavatories and conveniences on the mortgaged property and the maintenance repair and cleansing thereof by the mortgagees and the provision and supply by the Mortgagees of water and of means of lighting for the demised premises and other parts of the mortgaged property and of gas electricity and other illuminants and of meters for measuring the amount of gas electricity and other illuminants so supplied and with regard to the provision by the Mortgagees for the benefit of tenants of housekeepers caretakers lift attendants and other servants and the services to be rendered by them or other persons

in cleansing and dusting rooms and cleaning stairs corridors and lavatories and lighting and keeping up fires cleaning windows and chimneys and such other services and duties as the Mortgagees shall think fit in connection with the demised premises or the mortgaged property and generally with regard to all or any other measures which the Mortgagees shall consider to be proper for the use enjoyment and occupation of the demised premises or the mortgaged property by the tenants thereof respectively;

To appoint servants;

(ii) The Mortgagees may appoint and pay such housekeepers caretakers attendants servants and agents as may be necessary or proper for the purpose of maintaining and attending to the lifts and other appliances required for the accommodation of the tenants and occupiers of the mortgaged property and of providing such attendance for such tenants and occupiers as may be required by the terms of their leases or tenancy agreements or as the Mortgagees may think fit for the purpose of obtaining tenants for the mortgaged property and generally for maintaining and keeping up the mortgaged property as a block or blocks of flats or offices and also may incur such expenditure as the Mortgagees may think fit for repairs and otherwise in respect of or in relation to the lifts staircases corridors lavatories and roofs of the mortgaged property and all other parts thereof for the repair of which the tenants of the said premises shall not for the time being be liable;

To insure.

(iii) The Mortgagees may expend such sums as they shall think fit in insuring against all or any liabilities for damage or injury which may happen or be occasioned to any person or persons while using going upon or being in or upon any of the lifts staircases corridors lavatories or roofs of the mortgaged hereditaments or against any liabilities that they may incur under the Employers' Liability Act 1880 or the Workmen's Compensation Act 1925 or any amendment thereof respectively and all moneys expended by the Mortgagees under this provision shall be deemed to be properly paid by them;

Application of rents received by the mortgagees.

(iv) And it is hereby agreed that all rents and profits received by the Mortgagees shall be applied as far as the same will extend in the first place in payment of all costs and expenses

incurred by them in receiving or recovering the same or otherwise under this security and in the next place in discharge of any rents rates taxes expenses of repairs or insurance or other outgoings affecting the mortgaged premises and in the next place in payment of the interest owing on this security and the surplus (if any) of such rents and profits may at the option of the Mortgagees be either applied in redemption of the principal moneys for the time being owing on this security or paid into a bank to the account of the Mortgagees with power for them from time to time to apply the same as if it were rents and profits arising during the current year;

Power to take proceedings under s. 84 of the Law of Property Act, 1925.

(v) The Mortgagees may at any time if proceedings are threatened or taken to enforce any restrictive covenants and provisions which affect or may affect the mortgaged premises or any part thereof or if required to do so by any intending purchaser of the premises or any part thereof make an application under section 84 of the Law of Property Act 1925 to have such restrictive covenants and provisions declared to be unenforceable or to have such covenants and provisions modified or discharged so far as may be necessary to authorise the user of the premises as flats and may pay any compensation directed to be paid by the authority and all expenses and costs incidental to such application and any such compensation expenses and costs so paid by the Mortgagees shall be deemed to be costs charges and expenses properly paid by the Mortgagees.

Powers of receiver.

(4) The power to appoint a receiver shall be extended so as to confer on such receiver in addition to his statutory powers all the powers and rights hereinbefore conferred on the Mortgagees while in possession.

Form of consents.

5. All consents requests or directions required or authorised by this deed or any deed appointing a receiver of the rents and profits of the mortgaged premises or by any statute to be given by either party shall if signed on behalf of either party by their secretary or general manager for the time being be as effectual and valid as if the seal of the respective companies had been affixed thereto.

Mortgagees' costs.

6. All costs charges and expenses properly incurred hereunder by the Mortgagees and all moneys properly paid by

the Mortgagees shall together with interest thereon at the rate hereinafter mentioned be charged on the property for the time being subject to this security and shall on the same being paid be repaid on demand to the Mortgagees by the Borrowers with interest thereon from the time of payment at the rate of £—— per cent. per annum and until such demand shall be made and complied with the Borrowers shall in part payment of such interest pay to the Mortgagees interest at the rate aforesaid on the moneys so paid and for the time being not yet repaid on the respective days hereinbefore appointed for payment of interest on the said principal sum of £—— PROVIDED THAT the charge hereby conferred shall be in addition and without prejudice to any and every other remedy lien or security which the Mortgagees may or but for the said charge would have for the moneys thereby secured or any part thereof.

IN WITNESS *etc.*

THE FIRST SCHEDULE.

[*To contain a description of the mortgaged premises.*]

THE SECOND SCHEDULE.

[*To contain particulars of the indentures imposing restrictive covenants.*]

Form 32.

Letter to the Treasury asking for Sanction under the Defence (Finance) Regulations, 1939, to Issue Capital of a Company Proposed to be Formed, or to Issue any Security or Mortgage (*a*).

Sir,

I am [We are] instructed to inform you that a company is proposed to be incorporated under the Companies Act, 1929, under the title and with the objects and constitution specified

(*a*) The Defence (Finance) Regulations, 1939 (S. R. & O. 1939, No. 1620) made under the Emergency Powers (Defence) Act, 1939, control all capital issues. Regulation 6 provides as follows: "(1) Subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful, except with the consent of the Treasury and in accordance with such conditions as the Treasury may impose, to make an issue of capital in the United Kingdom, to make, in the United Kingdom, any

in the Memorandum and Articles of Association, drafts of which are enclosed herewith.

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public offer of securities for sale, or to renew or postpone the date of maturity of any security maturing for repayment in the United Kingdom.

"(2) Subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful to issue any prospectus or other document offering for subscription, or publicly offering for sale, any securities which does not include a statement that the consent of the Treasury has been obtained to the issue or offer of the securities.

"(3) For the purposes of this Regulation a person shall be deemed to make an issue of capital who—

(a) issues any securities (whether for cash or otherwise), or

(b) receives any money on loan on the terms, or in the expectation, that the loan will or may be repaid wholly or partly by the issue of any securities, or by the transfer of any securities issued after the making of the loan.

"(4) A security shall not be invalid by reason that the consent of the Treasury has not been given to the issue thereof, or that any conditions imposed by the Treasury in relation to the issue thereof have not been complied with, but nothing in this paragraph shall be construed as modifying the liability of any person to any penalty in respect of any failure to obtain such consent or to comply with such conditions.

"(5) In this Regulation, references to securities and to the issue of securities respectively include, as from the twenty-third day of November, nineteen hundred and thirty-nine, references to any mortgage or charge, whether legal or equitable, and to the creation of, or the increasing of the amount secured by, any such mortgage or charge; and the expression "security" includes a promissory note of a local authority and a deposit receipt for money lent issued by a local authority or by any person carrying on any business other than the business of banking.

"(6) In the application of this Regulation to Scotland any reference to a mortgage shall include a reference to a heritable security."

It will be observed that the regulation not only covers capital issues by a company but also ordinary mortgages by individuals as well as by companies. Failure to comply with these regulations is made an offence by regulation 9, incorporating the Defence (General) Regulations, 1939 (S. R. & O. 1939, No. 927), rr. 90—93, punishable with a maximum term of imprisonment of two years and a maximum fine of £500, or both.

There have been various orders exempting certain classes of capital issues from the restrictions imposed by regulation 6. The Capital Issues Exemptions (No. 3) Order, 1939 (S. R. & O. 1939, No. 1621), exempts transactions of the kinds mentioned in paras. 1 and 2 of regulation 6 so long as the value of the consideration involved, together with the value of the consideration involved on any previous transaction of those kinds, does not exceed £10,000.

These regulations succeed each other with some rapidity and it is always advisable, therefore, to see that a new regulation has not been issued before applying for leave to make any capital issue, for the tendency has been to extend the class of exemptions and leave may have become unnecessary.

The principal business of the company will consist of [*here set out shortly the proposed business*], and it is considered that the issue of the capital hereby requested to be sanctioned will be in the national interest for the following reasons, namely:— [*here set out reasons in full*].

The consent of the Lords Commissioners of His Majesty's Treasury to the issue of not more than £—— share capital [and £—— debentures] of the company is sought by the promoters, for whom I [we] act.

[*Or*, I am [We are] instructed to inform you that X of *etc.* is proposing to charge by way of legal mortgage all the freehold properties shortly described in the Schedule annexed hereto to secure the principal sum of £—— and interest to be advanced by Z of *etc.*

Or, I am [We are] instructed to inform you that the X Company, whose registered office is situate at *etc.*, is proposing to renew the first mortgage debentures charged on the assets of the company for a further term of —— years. A copy of the said debentures is enclosed herewith, together with a copy of the proposed deed renewing such debentures. It is submitted that this loan [*or*, renewal of the debentures] will be in the national interest for the following reasons:— [*here set out reasons in full*].]

[The consent of the Lords Commissioners of His Majesty's Treasury to such proposed charge for £—— [*or*, to the proposed renewal of the said debentures] is sought by X [*or*, the X Company], for whom I [we] act.]

I [We] shall be glad to be informed on their [his] behalf that such consent has been granted.

I am [We are] your obedient servant[s],

—— ——.

To the Capital Issues Committee,
76 King William Street, E.C.4.

THE SCHEDULE.

[*To contain particulars of properties charged, in the case of an application to sanction a mortgage.*]

Form 33.

Conveyance of Land to Secretary of State for Air where Property subject to a Sporting Licence and Land Compulsorily Acquired.

Drafted by E. O. Walford, LL.D., Solicitor.

Date.

Parties.

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN —— of —— of —— in the County of —— (hereinafter called "the Vendor") of the first part —— of —— in the County of —— (hereinafter called "the Chargees") of the second part and the Secretary of State for Air (hereinafter called "the Purchaser") for and on behalf of His Majesty of the third part

Recitals:

(1) Legal charge;

WHEREAS:

(1) By a Legal Charge dated the —— day of —— 19— made between the Vendor of the one part and the Chargees of the other part the Vendor being the estate owner in respect of the fee simple absolute in possession free from incumbrances charged by way of Legal Mortgage the property hereby conveyed together with other property to secure [all moneys owing by the Vendor to the Chargees from time to time whether solely or jointly with any other person] together with interest thereon as therein mentioned.

(2) Requirement by purchaser to acquire compulsorily;

(2) The Purchaser requires and is by virtue of the Defence Acts 1842 to 1935 the Ordnance Board Transfer Act 1855 the Air Force (Constitution) Act 1917 the Air Force (Application of Enactments) (No. 1) Order 1918 and the Air Navigation Act 1936 (which said Acts and Order are hereinafter referred to as "the said Acts") authorised subject to compliance with the provisions of section 23 of the Defence Act 1842 to acquire compulsorily and hold the property hereinafter described for the purposes of the Defence of the Realm.

(3) Certificate of Lord Lieutenant of the County and Treasury Warrant;

(3) By a Certificate dated the —— day of —— 19— under the hand of —— as Lord Lieutenant for the County of —— given under the provisions of section 23 of the Defence Act 1842 the taking of the property hereinafter described by the purchaser for the purposes of the said Acts was stated to be necessary or expedient and by Warrant dated the —— day of —— 19—

under the hands of the Commissioners of His Majesty's Treasury given under the provisions of the said section the taking of such land was duly authorised.

(4) By a Notice to Treat dated the —— day of —— 19— given under the provisions of the said Acts the Vendor was required to treat with the Purchaser as to the amount of purchase money compensation or consideration to be paid in respect of the property mentioned in the Schedule thereto being the property hereinafter assured. (4) Notice to treat;

(5) The compensation to be paid to the Vendor for the compulsory acquisition of the fee simple absolute in possession subject as hereinafter mentioned but otherwise free from incumbrances of the property hereinafter described has been agreed at the sum of £—— which sum included all compensation as hereinafter expressed. (5) Agreement of compensation for compulsory acquisition;

(6) The property hereby conveyed is (together with other property retained by the Vendor) subject to a Licence under seal in respect of sporting rights (*a*) for the term of twenty-one years from the —— day of —— 19— [determinable as therein mentioned] at a yearly rent of £—— granted to —— and dated the —— day of —— 19— and the apportioned yearly rent of £—— has been agreed between the Vendor and the Purchaser as the portion of the yearly rent payable under the said Licence which is to be attributable to the property hereby conveyed. (6) Sporting rights licence;

(7) The principal sum of £—— remains owing to the Chargees on the security of the said Legal Charge. (7) Amount owing under legal charge;

(8) It has been agreed that the sum of £—— part of the said purchase money shall be paid to the Chargees in part (8) Part of purchase price to be paid to legal chargees.

(*a*) It will be noted that in this case the licence in connection with sporting rights is under seal. It appears to be established that where there is a mere grant under hand of rights of sporting it is doubtful whether an "interest in land" is created. As the Lands Clauses Acts only confer rights of compensation on persons having an interest in the land compulsorily acquired the point is of importance. In the well-known case of *Bird* v. *Great Eastern Ry.*, 19 C. B. (N.S.) 265, Erle, C.J., expressed a doubt whether even a licensee under seal of sporting rights could claim compensation under the Lands Clauses Acts. But it now appears to be settled by the decision of the Court of Appeal in *Peach* v. *Best*, [1931] 1 K. B. 1, that he can do so. In that case Scrutton, L.J., expressly dissociated himself from the doubt expressed by Erle, C.J., in *Bird* v. *Great Eastern Ry.*, *supra*.

discharge of the amount so owing to them as aforesaid and that the Chargees shall concur herein in manner hereinafter appearing.

Testatum.

Now in consideration of the sum of £—— paid by the Purchaser by the direction of the Vendor to the Chargees (the receipt whereof the Chargees hereby acknowledge) and of the sum of £—— paid by the Purchaser to the Vendor (the receipt and payment in manner aforesaid of which respective sums making together the said purchase money of £—— the Vendor hereby acknowledges) THIS CONVEYANCE WITNESSETH as follows:—

Parcels.

1. THE Vendor as Beneficial Owner hereby conveys and the Chargees as Mortgagees by the direction of the Vendor hereby release unto the Purchaser ALL THAT piece or parcel of land —— as more particularly delineated on the plan annexed hereto and thereon coloured pink TO HOLD the same unto the Purchaser and his successors for ever for a legal estate in fee simple absolute in possession on behalf of His Majesty discharged from all claims under the said Legal Charge but subject to the Licence hereinbefore mentioned.

Habendum subject to the licence.

Compensation money to cover severance and depreciation of adjoining property or otherwise.

2. IT IS HEREBY AGREED that the said sum of £—— shall include compensation for and shall be deemed to be in full satisfaction of all claims by the Vendor on account of severance and depreciation of the adjoining estate of the Vendor or otherwise howsoever arising by reason of the exercise by the Purchaser of his statutory and other powers.

Purchaser accepts responsibility for compensation to the licensee on the footing that the acquisition is compulsory.

3. IT IS HEREBY DECLARED that the Purchaser accepts as between the Purchaser and the Vendor responsibility for compensation to the Licensee —— on the footing that this Conveyance is carried through by compulsory acquisition under the Acts and Order before referred to and with the like result so far as compensation to the Licensee is concerned (*b*).

(*b*) It is reasonably clear as the conveyance is made "subject to" the licence that the acquiring authority must in any case meet such claim as the licencee of the sporting rights may have. It also seems sufficiently clear from the decisions that the mere conveyance of the property to the acquiring authority after service of the notice to treat and the making of the order above recited does not render the sale a voluntary one. The clause is inserted *ex abundante cautela*.

4. The Chargees hereby acknowledge the right of the Purchaser to the production of the documents mentioned in the Schedule hereto (possession of which is retained by the Chargees) and to delivery of copies thereof.

Acknowledgment by chargees of right to production of deeds.

5. The Vendor hereby covenants with the Purchaser that as soon as the documents mentioned in the Schedule hereto or any of them shall come into the custody of the Vendor by reason of the satisfaction of the said mortgage debt or otherwise he will at the request and cost of the Purchaser or the persons deriving title under him give to him a statutory acknowledgment of right to production and undertaking for their safe custody.

Covenant by vendor to give acknowledgment upon obtaining possession of deeds.

In witness *etc.*

The Schedule above referred to.

[*List of documents above referred to.*]

Form 34.

Deed of Temporary Release in Consequence of the War of a Covenant to Pay an Annuity.

This indenture made the —— day of —— Between [*releasor*] of *etc.* of the one part and [*releasee*] of *etc.* of the other part

Whereas:—

1. By a deed dated *etc.* and made between —— of the one part and the said [*releasee*] of the other part the business and goodwill of a —— now carried on by the said [*releasee*] at —— were with other assets as therein mentioned assigned to the said [*releasee*] in consideration of the said [*releasee*] covenanting to pay to the said [*releasor*] during his [*or* her] life out of the net profits of the said business an annuity or yearly sum of £——.

2. By reason of the present European war the profits of the said business have fallen to such an extent that the payment of the said annuity or sum of £—— would be likely to involve the said [*releasee*] in serious financial and other difficulties.

3. With a view to avoiding such difficulties and the probable consequent loss of the said business and annuity the said [*releasor*] has at the request of the said [*releasee*] agreed temporarily to waive the payment of [part of] the said annuity in manner hereinafter mentioned.

Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the premises the said [*releasor*] hereby releases the said [*releasee*] his executors and administrators from all liability to pay to the said [*releasor*] [the sum of £—— per annum being part of] the said annuity or yearly sum of £—— [or any part thereof] under or by virtue of the said covenant during such period as Great Britain shall be at war with any European Power or Powers [and for one year thereafter] or for a period of three years from the date of these presents whichever shall be the shorter period [Provided that if the net profits of the said business shall at any time hereafter during the lifetime of the said [*releasor*] be in any year £—— or upwards then the said [*releasee*] shall pay to the said [*releasor*] in every such year the excess of profits over the said sum of £—— until the said [*releasor*] shall have been paid in full all such sums as would have been payable to him [*or* her] if the release herein contained had never been executed].

In witness *etc.*

Form 35.

Clause Negativing the Application of the Rules in Howe v. Lord Dartmouth and Allhusen v. Whittell (*a*).

I DIRECT that the income of my estate until sale shall as from my death be applied as if it were income from investments made under the power hereinafter contained and so that no reversionary or other property not actually producing income shall be treated as producing income and I FURTHER DIRECT that all my funeral and testamentary expenses and debts shall be paid out of the capital of my estate no part of these payments being apportioned to income.

(*a*) This clause is intended as a short form negativing the rules in *Howe* v. *Lord Dartmouth*, 7 Ves. 137, and in *Allhusen* v. *Whittell*, L. R. 4 Eq. 295 without mentioning these rules by name. Some testators object to any specific reference to these cases. They do not themselves understand what is meant and feel satisfied that they will not be understood by the beneficiaries concerned.

The general rule is that where the whole or any part of the residue of the testator's personal estate is settled, the tenant for life is entitled to the income of authorised investments not required for the payment of debts, but unauthorised investments, other than land, must, in the absence of express provision or some indication to the contrary (*Re Evans' Will Trusts*, [1921] 2 Ch. 309), be sold in accordance with the rule in *Howe* v. *Lord Dartmouth* and the proceeds invested in securities authorised by law or by the particular will for the investment of trust funds. Until sale the tenant for life is entitled to a sum representing interest at 4 per cent. (*Re Beech*, [1920] 1 Ch. 40) on the capital value of all unauthorised investments valued at the expiration of one year from the death.

The effect of the rule in *Allhusen* v. *Whittell* is to deprive the tenant for life of the income of such a sum as together with the income on that sum will be sufficient to discharge the liabilities of the deceased. The rule is to assure that where residue is limited to persons in succession their successive enjoyment shall be an enjoyment of the same fund (*Re McEuen*, [1913] 2 Ch. 704). The rule adjusts the deceased's liabilities fairly as between capital and income and should as a general rule not be negatived without express instructions.

Form 36.

Deed by Mortgagor Authorising the Mortgagee to Exercise his Statutory Powers Without Obtaining the Leave of the Court under the Courts (Emergency Powers) Act, 1939, and Notwithstanding the Provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and Appointing the Mortgagee to be the Mortgagor's Attorney (*a*).

Parties.

THIS DEED is made the —— day of —— BETWEEN A of *etc.* (hereinafter called "the Borrower") of the one part and B of *etc.* (hereinafter called "the Lender") of the other part

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(*a*) Stamp 10s. As this deed contains a power of attorney authorising dealings with the mortgaged land, the deed, or a certified copy thereof, must be filed in the Central Office under s. 125 of the Law of Property Act, 1925.

The purpose of this deed is to enable a mortgagee to exercise his power of sale and his other powers notwithstanding the restrictions imposed by the Courts (Emergency Powers) Act, 1939, in the case of mortgages executed before September 2, 1939, and those imposed by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, in the case of properties within those Acts.

The Courts (Emergency Powers) Act, 1939, s. 1 (2), provides: "Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court,—

(a) to proceed to exercise any remedy which is available to him by way of— . . .

(ii) the taking of possession of any property or the appointment of a receiver of any property; . . .

(iv) the realisation of any security . . . ; or

(b) to institute any proceedings for foreclosure or for sale in lieu of foreclosure, or take any step in any such proceedings instituted before the commencement of this Act".

This sub-section re-enacts with some change of language s. 1 (1) (b) of the Courts (Emergency Powers) Act, 1914, as amended by the Act of 1916. In the case of the earlier section there are *dicta* of Sargant, J., as he then was, in *Re Sandow, Ltd.*, [1916] W. N. 262, and of Lawrence, J., in *Anchor Trust Co., Ltd.* v. *Bell*, [1926] Ch. 805, at p. 822, to the effect that the earlier Acts gave a personal right to a mortgagor which could be waived. In *Soho Square Syndicate, Ltd.* v. *E. Pollard & Co., Ltd.*, [1940] W. N. 203, Farwell, J., refused to follow these decisions, holding that the effect of s. 1 (2) of the Act of 1939 was to make the statutory powers of a mortgagor only exercisable with the leave of the Court and that it was not possible to contract out of the Act. Any consent given by the mortgagor did not enable a mortgagee to exercise his powers. In view of this decision it is clear that a form such as this cannot authorise the mortgagee to exercise his powers. If the mortgagor wants complete security it is necessary for the parties to execute a new mortgage so that the mortgage

WHEREAS this deed is supplemental to the several deeds of mortgage (hereinafter called "the mortgages") more particularly specified in the First Schedule hereto whereby the several properties shortly described in the Second Schedule hereto (hereinafter called "the mortgaged properties") were respectively charged by the Borrower as the estate owner in respect of the fee simple therein in favour of the Lender to secure divers principal moneys and interest charged thereon

Recitals: Charges;

AND WHEREAS it is apprehended that certain of the mortgaged properties are subject to the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939

Rent Restrictions Acts;

AND WHEREAS under and by virtue of the provisions of the Courts (Emergency Powers) Act, 1939, the Lender is not

Courts (Emergency Powers) Act, 1939;

becomes a post-Act mortgage and outside the scope of the Act altogether. A form of such a mortgage is to be found *ante*, p. 479. It seems, however, that this question is somewhat academic. The only person to benefit by the statutory provisions is the mortgagor who, if he had expressly waived his rights with full knowledge of all the facts and of his rights under the Act, would be estopped from questioning any exercise by the mortgagee of his remedies without the leave of the Court. It is to be further observed that the provisions of s. 1 (2) of the Act of 1939 do not concern a purchaser from the mortgagee. S. 104 (2) of the Law of Property Act, 1925, provides that the title of a purchaser from a mortgagee exercising his statutory power of sale shall not be impeachable (*inter alia*) on the ground that (c) "where the mortgage is made after the commencement of this Act, that leave of the Court, when so required, was not obtained". Any person damnified by an unauthorised or improper exercise of the power is to have his remedy in damages against the person exercising the power. Such a deed as this, while not assisting the title of a purchaser, who requires no assistance, would prevent the mortgagor complaining of the exercise of the statutory power. This deed would seem, therefore, to afford adequate though not complete protection to a mortgagee. A power of attorney has been added to meet the case where it is not considered advisable in the light of the recent decision to rely on the doctrine of estoppel. The Act imposes no restriction on the exercise by the mortgagor of his powers as beneficial owner. If the mortgagee, therefore, is appointed the attorney of the mortgagor, he can appoint a receiver, lease or sell the property in the name of the mortgagor without recourse to his power as mortgagee.

In the case of property subject to the Rent and Mortgage Interest Restrictions Acts, the position is simple. S. 7 of the Act of 1920 provides that it shall not be lawful for any mortgagee, so long as interest is duly paid, the mortgagor's covenants are performed and the property repaired, to call in his mortgage or to take any steps for exercising any rights of foreclosure or sale. Under the proviso to the section it does not apply to a mortgage *inter alia* "in cases where the mortgagor consents to the exercise by the mortgagee of the powers conferred by the mortgage". An agreement to waive the protection of the Acts is therefore effective.

entitled to exercise his statutory and other powers as mortgagee without first obtaining the leave of the appropriate Court to do so

Interest in arrears;

AND WHEREAS (*b*) the sum of £—— is now due to the Lender in respect of arrears of interest but the Borrower admits that his inability to pay the said arrears of interest is not directly or indirectly attributable to the war

Agreement to the exercise by the mortgagee of his statutory powers;

AND WHEREAS the Lender is desirous of appointing a receiver or of selling or of otherwise exercising his statutory or other powers in respect of all or some of the mortgaged properties but he has agreed not to make an application under the Courts (Emergency Powers) Act, 1939, for the necessary leave to exercise such powers in consideration of the Borrower granting to him the authority and powers hereinafter contained

NOW THIS DEED WITNESSETH in pursuance of the premises and for the consideration aforesaid as follows:—

Authority to exercise statutory powers.

1. THE BORROWER hereby AGREES AND DECLARES that it shall be lawful for the Lender from time to time to exercise and enforce all the powers and remedies vested in him by statute or otherwise (including the power to appoint a receiver or to realise his security) in respect of the mortgaged properties or any of them as fully and effectually as he could have done if the Courts (Emergency Powers) Act, 1939, had not been passed.

Release of restrictions on Rent Restriction Acts.

2. THE BORROWER hereby AGREES AND DECLARES that he hereby consents (*c*) to the Lender exercising all the powers conferred by the mortgages or any of them and the restrictions contained in the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, shall not apply to the mortgaged properties or any of them.

(*b*) This admission in this recital should of itself protect the mortgagee. Under sub-s. (4) of s. 1 of the Act of 1939 the Court can only refuse leave to exercise the remedies in sub-s. (2) where the person liable to pay the debts "is unable immediately to do so by reason of circumstances directly or indirectly attributable to" the war. This admission therefore shows that the mortgagor could not successfully oppose any application for leave by the mortgagee under the Act. See *A* v. *B*, [1940] 1 K. B. 217; *Re an application by General London and Urban Properties, Ltd.*, [1940] W. N. 204.

(*c*) This follows the wording of the proviso to s. 7 of the Rent Restrictions Act of 1920.

Power of attorney.

3. The Borrower hereby appoints the Lender and the persons deriving title under him to be his attorney and in his name and on his behalf from time to time when the Lender thinks fit to appoint a receiver of or to sell by public auction or private contract or lease the whole or any part of the mortgaged properties and also to execute such deeds surrenders or other instruments as may be required for conveying the property or any part thereof to any purchaser thereof and to give effectual receipts and discharges for the purchase money and to enter into any covenant whether restrictive or otherwise And also in the meantime and until such sale to receive the rents and profits of the property and to recover the same when in arrear by action or distress and to do such other acts and things in or about the management of the property as the attorney shall think fit and it is hereby agreed that the power here conferred shall be irrevocable (*d*).

In witness *etc.*

The First Schedule.

[*To contain particulars of the Mortgages.*]

The Second Schedule.

[*To contain particulars of the mortgaged properties.*]

Form 37.

Conveyance of Moiety of Proceeds of Sale of Freehold Property subject to Existing Mortgage. Covenant by Purchaser to pay Mortgage Debt and Interest and to Observe Restrictive Covenants.

Drafted by Henry Ormesher, Solicitor.

This Conveyance is made the —— day of —— 19— between A B of *etc.* (hereinafter called "the Vendor") of the one part and C D of *etc.* (hereinafter called "the Purchaser") of the other part

Whereas:—

Recitals: of seisin.

1. The Vendor and E F are seised of a messuage or dwelling-

(*d*) As this power is given for value it may be made irrevocable. See s. 126 of the Law of Property Act, 1925.

house fronting to and numbered —— in —— Road —— in the County of —— and the land forming the site thereof and occupied therewith (hereinafter referred to as "the said property") for an estate in fee simple as joint tenants upon the statutory trusts for sale and upon trust to stand possessed of the proceeds of sale and the net rents and profits until sale for the Vendor and the said E F as tenants in common in equal shares and otherwise declared by a Conveyance dated the —— day of —— 19— made between —— of the one part and the Vendor and the said E F of the other part Subject to the observance and performance of certain covenants and conditions and to certain powers therein more particularly mentioned And subject also to a Mortgage (hereinafter referred to as "the Mortgage") dated the —— day of —— 19— made between the Vendor and the said E F of the one part and G H of the other part whereby in consideration of the sum of £—— paid by the said G H to the Vendor and the said E F the said property was demised to the said G H by way of Mortgage for the term of 3000 years from the date of the Mortgage for securing the payment to the said G H of the said principal sum of £—— and interest and other moneys therein referred to.

State of mortgage debt.

2. The sum of £—— only part of the said principal sum of £—— remains owing to the said G H on the security of the Mortgage but all interest due to the date hereof and other moneys due under the Mortgage have been duly paid.

Agreement for sale of a moiety.

3. The Vendor has agreed with the Purchaser for the sale and transfer to him of the moiety or share and interest of him the Vendor of and in the said property and the proceeds of sale thereof subject to the Mortgage and the said sum of £—— and the interest and other moneys to become due thereunder so far as the said share and interest is affected thereby for the sum of £——.

Now this deed witnesseth as follows:—

Conveyance of a moiety of proceeds of sale.

1. In pursuance of the said agreement and in consideration of the sum of £—— on or before the execution of these presents paid to the Vendor by the Purchaser (the receipt of which sum the Vendor hereby acknowledges) and also in consideration of the covenants on the part of the Purchaser hereinafter contained

the Vendor as Beneficial Owner hereby conveys and assigns unto the Purchaser ALL THAT the one equal undivided moiety or half part or share or other the estate and interest of the Vendor of and in the said property and the proceeds of sale thereof and the net rents and profits until sale thereof TO HOLD UNTO the Purchaser in fee simple or absolutely SUBJECT to the observance and performance of the covenants conditions and powers referred to in the said Conveyance of the —— day of —— 19— so far as the same ought to be observed and performed in respect of the moiety or share hereby assured AND SUBJECT ALSO to the Mortgage and to the term thereby granted and to the payment of the said sum of £—— now owing as aforesaid and the interest and other moneys to become due thereunder so far as the moiety or share hereby assured is affected thereby.

2. THE Purchaser hereby covenants with the Vendor as follows:— Covenant to pay mortgage debt and interest;

(a) That the Purchaser and the persons deriving title under him will pay the said sum of £—— and all interest and other moneys to become due under the Mortgage so far as aforesaid and will at all times hereafter keep the Vendor and his estate and effects indemnified from and against the said sum interest and other moneys secured by the Mortgage and from and against all actions proceedings costs damages claims and demands whatsoever in respect thereof.

(b) That the Purchaser (by way of affording to the Vendor a full and sufficient indemnity but not further or otherwise) for himself and the persons deriving title under him will at all times hereafter observe and perform the covenants conditions and powers subject to which the said moiety or share is hereinbefore assured so far as aforesaid and will keep the Vendor and his estate and effects indemnified from and against all actions proceedings costs damages claims and demands on account of the breach non-observance or non-performance thereof respectively. to observe and perform covenants.

[3. IT is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds £500.] Statement as to value.

In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first before written.

Signed sealed and delivered by the said A B in the presence of }

Signed sealed and delivered by the said C D in the presence of }

Form 38.

Appointment of New Trustees supplemental to Preceding Conveyance.

Drafted by Henry Ormesher, Solicitor.

This Appointment is made the —— day of —— 19— between A B of *etc.* and E F of *etc.* (hereinafter called "the Appointors") of the one part and C D of *etc.* (hereinafter called "the Appointee") of the other part

Recitals: of conveyance to joint tenants; Whereas these presents are supplemental to (i) a Conveyance (hereinafter called "the Conveyance") dated the —— day of —— 19— made between —— of the one part and the Appointors of the other part whereby a messuage or dwelling-house fronting to and numbered —— in —— Road —— in the County of —— and the land forming the site thereof and occupied therewith (hereinafter referred to as "the said property") became vested in the Appointors for an estate in fee simple as joint tenants upon the statutory trusts for sale and otherwise declared by the Conveyance and subject as therein mentioned;

of mortgage; (ii) a Mortgage (hereinafter referred to as "the Mortgage") dated the —— day of —— 19— made between the Appointors of the one part and G H of the other part whereby the said property was demised to the said G H for the term of 3000 years from the date of the Mortgage for securing the payment to the

said G H of the principal sum of £—— and interest and other moneys therein referred to;

(iii) a Conveyance dated the —— day of —— 19— made between the said A B of the one part and the Appointee of the other part whereby the one equal undivided moiety or half part or share or other the estate and interest of the said A B of and in the said property and the proceeds of sale thereof and the net rents and profits until sale thereof became vested in the Appointee in fee simple or absolutely subject as in the Conveyance mentioned and subject to the Mortgage so far as such moiety or share was affected thereby

of conveyance of moiety of proceeds of sale.

AND WHEREAS the Appointors being the present trustees for sale as aforesaid of the said property are desirous of appointing the Appointee to be a new trustee in the place of the said A B

NOW THIS DEED WITNESSETH that in pursuance of the said desire and in exercise of the power for this purpose conferred on them by the statute in that behalf and of every or any other power enabling them they the Appointors hereby appoint the Appointee to be a Trustee in the place of the said A B and to act jointly with the said E F for the purposes of the Conveyance or such of the same purposes as are still subsisting and capable of taking effect

Appointment.

IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first before written.

SIGNED SEALED AND DELIVERED by the said A B in the presence of }

SIGNED SEALED AND DELIVERED by the said E F in the presence of }

Form 39.

Agreement for the Supply of Water by a Landowner to Land of an Adjoining Owner (*a*).

Drafted by Messrs. Meynell & Pemberton, Solicitors, in conjunction with Arthur M. Maslen, LL.B., Solicitor.

Parties.

THIS AGREEMENT dated the —— day of —— 19— BETWEEN —— of *etc.* (hereinafter called "the Grantor") of the one part and —— of *etc.* (hereinafter called "the Grantee") of the other part

Recital of ownership.

WHEREAS the Grantor is the owner of the land in the Parish of —— in the County of —— shown edged with blue on the plan attached hereto (*b*) and the Grantee is the owner of the neighbouring land edged with red on the said plan attached hereto (*b*) on which land has been erected —— (*c*) known as ——

NOW IT IS HEREBY AGREED as follows:—

Agreement for supply.

1. The Grantee his successors in title and assigns the owners or owner occupiers or occupier for the time being of the land edged with red on the said plan including the said —— (*c*) known as —— shown on the said plan shall be entitled to such a supply of water and of such a quality as may be available (*d*) from the spring marked "A" on the said plan and situate in Field Ordnance No. —— through the pipe line marked in green on the said plan or such other pipe line as the Grantor may from time to time substitute for the same (*e*) for use on the land edged with red including —— aforesaid (*c*) and to the right

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(*a*) This agreement setting up an equitable easement should be registered as such under the provisions of the Land Charges Act, 1925, and should be signed in duplicate. Stamp 6d.

(*b*) The description by reference to a plan will facilitate identity and result in a shortening of the recitals.

(*c*) Here should be inserted a description of any house or buildings to benefit from the supply.

(*d*) The Grantor thus negatives any warranty as to the amount or quality of the water supplied.

(*e*) This will enable the Grantor to alter the position of the pipe line in the event of his wishing to develop his land for building or other purposes.

to the flow of water through the said pipe for the purposes of such supply.

2. The Grantee shall affix and maintain in good repair and condition at his own expense a meter at the point marked "B" on the said plan and shall pay to the Grantor —— for every 1,000 gallons of water passing through such meter and used for the supply to —— aforesaid or such other land or buildings of the Grantee within the land edged red as aforesaid such payment to be made on the —— day of —— in each year and to be for the water consumed for the twelve months prior to such date. Maintenance and repair of meter.

3. The Grantor shall maintain and keep in good order repair and condition the pipe line coloured green on the said plan or such other pipe line as the Grantor may from time to time substitute for the same within the land of the Grantor (*f*) edged blue on the said plan and in the event of his failing to commence any necessary work within seven days after having received from the Grantee seven days' previous notice in writing requesting him to do so the Grantee shall have the right to enter upon that portion of the land edged with blue on the said plan under which the pipe line shall be laid and effect such repairs as may be necessary to maintain such pipe line in good repair order and condition and the cost thereof shall be paid by the Grantor. Maintenance and repair of pipes.

4. The Grantor shall not knowingly permit any act which may interfere with the normal and natural flow of water from the said spring marked "A" Provided nevertheless that this clause shall not be construed so as to interfere with or limit the use of water flowing from the said spring by the Grantor his successors in title and assigns the owner or owners occupier or occupiers for the time being of the land edged with blue on the said plan. Non-interference.

5. The Grantor shall have the right whenever he may so desire to enter upon the land of the Grantee for the purpose of taking readings from the said meter. Right of access.

(*f*) This frees the Grantor from responsibility to repair or replace any portion of the pipe line which is not laid under his own land.

Power to discontinue supply of water on non-payment of rent.

6. In default of payment by the Grantee for water consumed by him as aforesaid within twenty-one days of notice of such payment being served upon him the Grantor shall have the right in addition to any other remedies available to him to discontinue the supply of water to the Grantee and thereupon this agreement shall be determinable at the option of the Grantor but without prejudice to any right of action or remedy of the Grantor in respect of any antecedent breach of agreement on the part of the Grantee.

Notice of change of address and ownership.

7. The Grantee shall give to the Grantor notice in writing of any change of his address or of the ownership of any portion of the land of the Grantee edged red on the said plan within fourteen days of any such change taking place (*g*).

Power for both parties to determine.

8. Either party [the Grantee] shall have the right upon giving to the other of them [the Grantor] twelve months' notice expiring at any time to determine this Agreement and upon the expiration of such notice this Agreement shall determine but without prejudice to any right of action of the Grantor or Grantee in respect of any antecedent breach of agreement.

Notices.

9. Any demand or notice served or given under the provisions of this Agreement may be delivered personally to the person on and to whom the same is to be served or given or may be left at his above-mentioned or other last known address or may be posted in a prepaid letter addressed to him at such address and in such event shall be deemed to have been received on the day following the day of posting.

As WITNESS the hands of the parties hereto the day and year first above written.

(*g*) Thus the Grantor has notice of the person or persons who may claim the benefit of the agreement.

Form 40.

Power of Attorney under the Execution of Trusts (Emergency Provisions) Act, 1939, Extending to All Trusts and Powers Vested in the Principal (*a*).

Drafted by A. H. Withers, of Lincoln's Inn.

KNOW ALL MEN BY THIS POWER OF ATTORNEY that I —— of —— hereby declare and appoint as follows:—

1. In this deed the following expressions shall have the following meanings that is to say:—

(A) "The said Act" shall mean the Execution of Trusts (Emergency Provisions) Act 1939;

(B) Expressions defined in the said Act shall have the meanings respectively assigned to them by the said Act;

(C) "My attorney" (*b*) shall mean A of —— and after his death B of ——;

["My attorneys" shall mean C of —— and D of —— and the survivor of them;]

(D) "The duration of this power" shall mean and include (1) the period during which I am or shall be engaged in war

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(*a*) Stamp, 10s. This power takes effect under the Execution of Trusts (Emergency Provisions) Act, 1939. This is an alternative to form 20, p. 473. It must be attested by at least one witness: s. 3 (1). Under s. 1 (4) of the Act and s. 219 of the Supreme Court of Judicature (Consolidation) Act, 1925, the power may be deposited in the Central Office, but this is not necessary. If the power extends to dealings in Court, so as to bring it within s. 125 of the Law of Property Act, 1925, the power must be filed.

When the principal is abroad or about to go abroad it may be equally convenient to give a power of attorney under s. 25 of the Trustee Act, 1925: see the *Conveyancer and Property Lawyer* (N.S.), vol. I, p. 459. The power conferred by the Act of 1939 is in addition to that conferred by the Trustee Act, 1925: see s. 1 (6).

(*b*) (a) It does not seem possible effectually to provide that, if the attorney is unable or unwilling to act, someone else shall take his place—for the difficulty is to prove the facts. The same difficulty arises if the alternative appointment is to take effect on the person primarily appointed disclaiming or renouncing, for he may have to prove that he has not done so. Death is a different matter.

(b) There is not any difficulty as to an alternative appointment on death, because an appointment can be made for part of the period: see s. 1 (1).

service and the period of one month thereafter and (2) any and every period during which I shall be outside the United Kingdom and for any reason connected with the present war it shall not be reasonably practicable for me to return to the United Kingdom.

2. (A) This deed is executed by me in exercise of the powers in this behalf conferred on me by the said Act and of every or any other power enabling me in this behalf;

(B) I am [expect to be] engaged in war service (*c*).

3. (A) I hereby delegate to my attorney [my attorneys and (if and so far as the said Act so allows) to each of my attorneys severally] the exercise during the whole of the duration of this power of all the functions vested (*d*) in me as a trustee personal representative tenant for life or statutory owner (either alone or jointly with any other person or persons) and also (in cases where I am a sole personal representative or one of several personal representatives) of all the functions which may in the future devolve on me by reason of my becoming a trustee of the estate when the administration thereof is completed;

(B) Subject to the provisions of the said Act such delegation extends in the fullest manner possible to all trusts estates and settlements however numerous and of whatever character the same may be or become and (in particular) to the trusts estates and settlements mentioned or referred to in the Schedule hereto.

4. I hereby appoint my attorney [my attorneys and (if and so far as I can do so) each (*e*) of my attorneys severally] to be my [attorneys or] attorney for me and on my behalf and in the name of myself or otherwise to execute and do or join in executing and doing all such deeds instruments acts and things

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(*c*) The power *can* be given *before* the principal is engaged in war service—see s. 3 (1)—and, as to powers when not so engaged, before the principal goes abroad—see ss. 1 (5), 3 (1), 4 (4).

The provisions of s. 1 (5), relative to absence abroad, appear to apply to the case where the principal is a prisoner abroad.

(*d*) The power cannot be extended to trusts of which the principal may hereafter become a trustee: see the latter part of s. 1 (2). Moreover, in such a case the attorney would have to be given express power to accept the trust or to obtain the grant of probate or letters of administration.

(*e*) It is doubtful whether the power can be given to *each* of several attorneys.

as shall be required or proper to be executed or done in or about the exercise of the said functions or any of them as fully and effectually as I myself could have executed or done or joined in executing or doing the same.

IN WITNESS *etc.*

THE SCHEDULE.

[*Particulars of the trusts, etc., specifically referred to in the above power of attorney.*]

Form 41.

Conveyance of Freeholds by a Surviving Tenant in Common who has become Absolutely and Beneficially Entitled to the Entirety of the Property (*a*).

THIS CONVEYANCE is made the —— day of —— BETWEEN A of *etc.* (hereinafter called "the Vendor") of the one part and B of *etc.* (hereinafter called "the Purchaser") of the other part

Parties.

WHEREAS by an indenture of conveyance made the —— day of —— 19— between X of the one part and the Vendor and Y of the other part the house and land hereinafter assured were conveyed to the Vendor and Y their heirs and assigns as tenants in common in equal shares

Recitals: Conveyance to tenants in common;

(*a*) Stamp *ad valorem* on the purchase price. Where the legal estate in land is vested in two or more persons upon trust for themselves as joint tenants or for themselves as tenants in common, should the entire beneficial interest become vested in the survivor, two methods of making title are open to him. Such survivor may, as in this deed, make title by virtue of his legal and equitable interests or he may make title under the statutory or express trust for sale which affects the property. If the surviving joint tenant wishes to make title by virtue of his equitable powers, the conveyance must contain full recitals of how the entirety became vested in him. Where, however, there have been a number of dealings with the equitable interests of a complicated character, it is advisable for the surviving estate owner not to make title by virtue of his equitable powers but to appoint an additional trustee of the statutory trusts or trust for sale and sell under those trusts, which, by virtue of s. 23 of the Law of Property Act, 1925, are deemed to be subsisting until the land has been conveyed under the direction of the persons interested. It is only when the equitable title is simple that it is advisable to make title to the legal estate by virtue of equitable powers.

Transitional provisions;

AND WHEREAS under and by virtue of the transitional provisions contained in the Law of Property Act 1925 the legal estate in the said house and land became vested on the 1st day of January 1926 in the Vendor and the said Y as joint tenants upon the statutory trusts for sale in the said Act defined

Will of one tenant in common;

AND WHEREAS by his will dated the —— day of —— the said Y (hereinafter called "the Testator") appointed the Vendor and Z to be the executors thereof and thereby devised and bequeathed all the equal undivided half share of the testator of and in the proceeds of sale of the said house and land and in the rents and profits thereof until sale unto the Vendor absolutely

Death of tenant in common;

AND WHEREAS the Testator died on the —— day of —— without having altered or revoked his said will which was duly proved by the Vendor and the said Z on the —— day of —— in the Principal [*or* —— District] Probate Registry

Assent;

AND WHEREAS by an assent (*b*) made the —— day of —— the Vendor and Z as personal representatives of the Testator assented to one equal undivided share of the proceeds of sale of the said house and lands and of the rents and profits thereof until sale vesting in the Vendor absolutely

Agreement for sale.

AND WHEREAS by virtue of the power vested in him by the Law of Property (Amendment) Act 1926 (*c*) as the survivor of himself and the Testator and being solely and beneficially entitled to the said house and land the Vendor has agreed with the Purchaser for the sale to him of the said house and land for an estate in fee simple free from incumbrances for the sum of £——

NOW THIS DEED WITNESSETH that in pursuance of the recited agreement and in consideration of the sum of £—— now paid

---

(*b*) The assent will be an assent in respect of an equitable interest only; the probate, therefore, will not be a document of title and no acknowledgment of the right to its production can strictly be required.

(*c*) The amending Act of 1926 added at the end of s. 36 (2) of the Law of Property Act, 1925, an express statement that the survivor of joint tenants, who becomes solely and beneficially interested, can deal with the legal estate as if it were not held on trust for sale. This statement is really declaratory of the law. It makes it, however, clear that such a surviving tenant may refuse title under the trust for sale and require a purchaser to accept title by virtue of his beneficial interests.

by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges) the Vendor as beneficial owner hereby conveys unto the Purchaser ALL THAT piece or parcel of land together with the dwelling-house erected thereon known as —— situate at —— as the same is more particularly described in the schedule hereto TO HOLD unto the Purchaser in fee simple freed and discharged from the aforesaid statutory trusts [*Add acknowledgment and undertaking as to documents of title and statement as to value if required.*]

IN WITNESS *etc.*

THE SCHEDULE.

[*To contain a description of the property.*]

Form 42.

Conveyance and Subsidiary Vesting Deed of a Parsonage House and Lands under the Parsonages Measure, 1938, to a Purchaser who is Buying as Tenant for Life under the Settled Land Act, 1925 (*a*).

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN the Reverend A of *etc.* Incumbent of the benefice of the —— of *etc.* in the County of —— and Diocese of —— (hereinafter called "the Incumbent") of the first part The Governors of the Bounty of Queen Anne for the Augmentation of the Maintenance of the Poor Clergy (hereinafter called "the Governors") of the second part B of *etc.* in the County of —— (hereinafter called "the Purchaser") of the third part and C of *etc.* and D of etc. (hereinafter called "the Trustees") of the fourth part Parties.

WHEREAS:— Recitals:

(1) (*b*) The property hereby assured consists of the residence house gardens orchard and appurtenances belonging to the said benefice and for good and sufficient reasons it has been thought advisable to sell and dispose thereof and the Incumbent has Agreement for sale;

(*a*) This deed is exempt from stamp duty: see s. 18 of the Parsonages Measure, 1938, extending the operation of s. 15 of the Clergy Residences Repair Act, 1776.

(*b*) This recital follows the wording of s. 1 of the Measure of 1938.

pursuant to the Parsonages Measure 1938 agreed with the Purchaser for the sale of the said property to the Purchaser in fee simple for the sum of £*y* subject as is hereinafter mentioned.

Requirements of Measure fulfilled; Principal vesting deed.

(2) (*c*) All the requirements of the said Measure with respect to the transaction hereby carried out have been complied with.

(3) By a principal vesting deed (*d*) (hereinafter called the "principal deed") made the —— day of —— between the Trustees of the one part and the Purchaser of the other part the X Settled Estates situate in the County of —— were vested in the Purchaser upon the trusts and subject to the powers and provisions upon and subject to which under the trust instrument made the —— day of —— and therein more particularly recited the same ought to be held from time to time and it was also declared that the Trustees were the trustees of the said settlement for the purposes of the Settled Land Act 1925.

Conveyance.

NOW IT IS HEREBY WITNESSED as follows:—

1. In pursuance of the said agreement and in consideration of the sum of £*y* paid by the Trustees by the direction of the Purchaser with the privity of the Incumbent to the Governors (*e*) (the receipt of which sum the Governors hereby acknowledge) the Incumbent (*f*) in exercise of the powers and provisions of the said Measure hereby with the consent of the Governors conveys unto the Purchaser ALL THAT [*here insert description of property*] containing —— (*g*) acres or thereabouts as the said premises are for the purpose of identification only delineated

---

(*c*) S. 9 (2) of the Measure provides that the sealing by Queen Anne's Bounty of any conveyance under the Measure shall be conclusive evidence that all the requirements of the Measure have been complied with. It is therefore not necessary to recite matters merely intended to show that this has been done.

(*d*) Where a purchase is made by a tenant for life under the powers conferred by the Settled Land Act, 1925, it must, in accordance with the provisions of s. 10, be vested in the tenant for life by a subsidiary vesting deed which fulfils the requirements of sub-s. 2.

(*e*) The purchase moneys are to be paid to Queen Anne's Bounty: s. 1 (5). The receipt of the treasurer, which is a good discharge to the purchaser, should be endorsed on the deed.

(*f*) The property is conveyed by the incumbent of the benefice in his corporate capacity: s. 9 (1).

(*g*) The parcels should make it plain that not more than twelve acres are being sold, as the power of sale conferred by the Measure is limited to twelve acres: see s. 1 (3) (i).

on the plan drawn hereon and are thereon coloured pink EXCEPT AND RESERVING to the Incumbent and his successors all coal (*h*) and mines of coal and all property and rights whatsoever annexed or appertaining thereto to which the Coal Act 1938 applies and all compensation moneys payable under the said Act in respect thereof TO HOLD unto the Purchaser in fee simple upon and subject to the same trusts and powers as are declared by the principal deed by reference as aforesaid with respect to the property therein comprised.

Restrictive covenant.

2. The Purchaser hereby covenants with the Incumbent and his successors that he the Purchaser will not at any time hereafter call or designate the messuage or dwelling-house hereby conveyed or permit the same to be called or designated "The Vicarage" or "—— Vicarage" or "The Rectory" or "—— Rectory" or by any other name that would suggest that the said property is occupied by the Incumbent of the benefice of —— aforesaid.

Covenants for title.

3. The Incumbent hereby covenants with the Purchaser that he the Incumbent has not done or knowingly omitted or suffered or been party or privy to any act matter or thing whereby the property hereby conveyed or any part thereof is or may be affected or incumbered in any wise howsoever or whereby he is prevented from conveying the said property or any part thereof respectively in manner aforesaid.

4. The Trustees are the trustees of the settlement for all the purposes of the Settled Land Act 1925.

5. The power of appointing a new trustee or new trustees of the principal deed is vested in the Purchaser during his life [*or as the case may be*].

6. —— who retain the possession of the documents specified in the Schedule hereto hereby acknowledge the right of the Purchaser to production of the said documents and to delivery of copies thereof.

(*h*) Until the Coal Act, 1938, has operated to vest all coal in the Coal Commission it is advisable to make it clear that the vendor reserves the coal and the right to compensation under the Act. If this is not done, difficult questions may arise as to the persons entitled to the compensation moneys and their apportionment.

In witness whereof the Governors have caused their Common Seal to be hereunto affixed and the other parties hereto have hereunto set their respective hands and seals the day and year first above written.

The Schedule.

[*To contain particulars of the documents retained.*]

Form 43.

Clause in Will giving the Residuary Estate on Charitable Trusts to be Selected or Founded by the Trustees (*a*).

Drafted by A. H. Withers, of Lincoln's Inn.

My Trustees shall hold my residuary estate upon charitable trusts (*b*) [in connection with the town of X] subject to the following conditions and with the following powers that is to say:—

(A) Every trust charity or purpose created [or benefiting] hereunder shall be a valid trust or charity for all or any of the following objects namely:—

[*Here set out generally the wishes of the testator*]

Provided always if any object hereinbefore in this sub-clause mentioned is not charitable or cannot be attained its place in the foregoing provision shall be taken by such charitable purpose as shall in the opinion of my Trustees [to be declared by deed within —— years of my death] approximate as nearly as practicable to the object so in fact mentioned (*c*).

(B) My Trustees shall have the following powers exercis-

(*a*) Testators occasionally give valuable properties to their trustees, leaving them to devote the same to charity, with or without restrictions. The object of this precedent is to provide clauses for consideration on preparation of the will.

(*b*) This declaration of a primary charitable trust enables the fund to be administered *cy-près*, if the trusts subsequently declared fail or are impracticable.

(*c*) Some such provision as this is desirable in case owing to loose wording or a mistake an object selected by the testator is not charitable. See *Farley* v. *Westminster Bank*, [1939] A. C. 430.

able from time to time as they (consistently with the above provisions) may think fit that is to say:—

(1) Power to give money or other property to the governing body of any charity for the general purposes of such charity or for any specific purpose of or in connection with such charity (*d*).

(2) Power during the period of twenty-one years from my death to accumulate any income by adding the same to the capital of my residuary estate or any part thereof (*e*).

(3) Power by deed to declare a charitable trust or charitable trusts of any property and to provide for the constitution management and carrying on of every or any such charity (*f*) and in particular with respect to any such charity.

(a) To appoint the original trustees (if any) and the original governors of the charity and to provide for the manner in which trustees and governors respectively may be appointed or removed or may retire.

(b) To make or provide for the making of rules dealing with any matters whatsoever [and in particular rules regulating (i) the meetings of trustees and governors respectively; (ii) the appointment employment remuneration and removal of officers and servants respectively; (iii) the duties and powers of trustees governors officers and servants respectively; (iv) the qualifications of persons benefiting by the charity and the mode terms and conditions on which benefits are to be provided; and (v) the appointment of patrons and the privileges of subscribers to the charity].

(*d*) This power will not be wanted in a case where the testator wishes to found a particular charity.

(*e*) This power may be useful where some time must elapse before the charity is founded.

(*f*) This power and the subsequent provisions of this precedent are powers that the trustees should have when they found any particular charity.

(c) To provide for the making of additions to and alterations and rescissions of any rule or rules from time to time in force.

(4) Power to promote a company (*g*) (not paying any dividend to its members) to manage and carry on any charity created under the powers of this my will.

(5) Power to apply to any Court or authority for any order or scheme and (in particular) any order or scheme enabling any land to be retained unsold or to be acquired or establishing or regulating any charity.

Form 44.

Will of a Widow Leaving the Greater Portion of her Estate to her Only Daughter with Directions for Certain Legacies to be Paid Only in the Event of her Daughter's Income being Greater than a Fixed Sum and such Legacies (if Payable) to be Paid out of Income.

Drafted by Frederick Wm. Kay, Solicitor, of Rochdale.

THIS IS THE LAST WILL of me A B of *etc.*

1. I HEREBY REVOKE all former wills and codicils made by me.

2. I APPOINT [*naming them*] (who and the survivors and last survivor of whom and all other the trustees or trustee for the time being of this my will are hereinafter referred to as "my Trustees") to be EXECUTORS and TRUSTEES of this my will.

3. I DEVISE and BEQUEATH all my real and personal estate and effects whatsoever and wheresoever unto my Trustees UPON TRUST to sell call in and convert the same into money (with power in their discretion to postpone such sale calling in and conversion) and after payment thereout of my debts funeral and testamentary expenses and death duties UPON TRUST to hold the same (hereinafter called "my residuary estate") Upon the following trusts:—

(1) If the net income of my residuary estate (after deducting income tax) shall not exceed such a sum as when added to the

(*g*) See s. 18 of the Companies Act, 1929.

net income (after deducting income tax) which my daughter [*name*] will become entitled to by reason of my death under the will of my late husband C D (hereinafter called "the trust income") will yield to my said daughter the clear sum of £2,000 for the twelve months expiring one year from the date of my death THEN I DECLARE that my Trustees shall hold the whole of the capital and income of my residuary estate UPON TRUST to pay the same unto my daughter the said [*name*] absolutely and beneficially.

(2) If the net income of my residuary estate (after deducting income tax) shall when added to the trust income yield more than £2,000 THEN I DECLARE that my Trustees shall hold my residuary estate UPON TRUST to invest the same in their names in any investments authorised by law and to hold such investments and any part of my estate for the time being unsold upon the following trusts:—

(a) UPON TRUST to pay to my daughter the said [*name*] during the period hereinafter mentioned out of the income of my residuary estate such sum per annum as with the addition of the trust income will yield to her a clear sum of £2,000 per annum free of income tax;

(b) DURING a period of seven years from the date of my death or for such shorter period as may be necessary for the purposes hereinafter mentioned UPON TRUST to accumulate any surplus income of my residuary estate after the annual payments to my daughter hereinbefore mentioned (hereinafter called "the surplus income") and apply the same in payment of the pecuniary legacies hereinafter mentioned (hereinafter called "the contingent legacies") and the legacy duty thereon the contingent legacies not to become payable until the expiration of such period of seven years or until sufficient money has been accumulated by the retention of the surplus income to pay the whole of the contingent legacies and the legacy duty thereon And provided that no contingent legacy shall be paid to the estate of any person who may have been living at my death but who may die within the said period of seven years before having received payment of his or her contingent legacy and any such legacy shall be considered to have been revoked;

(c) THE contingent legacies above referred to (which shall be paid free of legacy duty) are as follows:—

[*Set out legacies*].

IN the event of the total accumulations of the surplus income for the said period of seven years not being sufficient to pay the contingent legacies and the legacy duty thereon in full THEN I DECLARE that the contingent legacies shall abate proportionately.

(3) SUBJECT to the trust for accumulation before contained for the payment of the contingent legacies my Trustees shall hold the whole of the capital and income of my residuary estate UPON TRUST to pay the same to my daughter the said [*name*] absolutely and beneficially PROVIDED ALWAYS that my Trustees shall notwithstanding the provisions for accumulation herein contained at the request of my said daughter pay the contingent legacies and the legacy duty thereon out of the capital of my residuary estate.

IN WITNESS *etc.*

Form 45.

Assignment of Book Debts by the Trustee under a Deed of Arrangement, the Debts being due in part to the Debtor and in part to the Trustee, as Trustee of the Deed (*a*).

THIS ASSIGNMENT made the —— day of —— 19— BETWEEN A B of *etc.* (hereinafter called "the Vendor") of the one part and C D of *etc.* (hereinafter called "the Purchaser") of the other part

WHEREAS:

(1) All or some of the persons named in the Schedule hereto were indebted to X Y of *etc.* at the time of the execution of the deed of arrangement next hereinafter recited.

(2) By a deed of arrangement made the —— day of —— 19— between the said X Y of the first part the Vendor of the second part and the several persons companies and partnership

(*a*) Stamp, *ad valorem* on the purchase price. This precedent was drafted by T. A. Needham & Son, solicitors.

firms being creditors of the said X Y whose names and addresses were set forth in the Schedule thereto and all other persons (if any) who were creditors of the said X Y and should assent thereto in writing or otherwise of the third part the said X Y assigned All the personal estate whatsoever and wheresoever of or to which he might be possessed or entitled in any manner whatsoever unto the Vendor absolutely Upon trust (*inter alia*) to carry on the business of the said X Y and to call in collect and receive or sell and dispose of all or any part of the property by private contract and out of the moneys to be so realised to pay costs charges expenses and prior claims as therein mentioned and to divide the residue of the said money rateably amongst the creditors in proportion to the amounts of their respective debts in like manner in all respects as the said money would be divisible under the law of bankruptcy if the said X Y had been on and at the date thereof duly adjudged bankrupt.

(3) The said deed of arrangement was duly registered in accordance with the provisions of the Deeds of Arrangement Act 1914 (as amended by the Administration of Justice Act 1925) on the —— day of —— 19—.

(4) On the —— day of 19— the Vendor duly filed with the Registrar for the purposes of the said Act the statutory declaration that the requisite majority in number and value of the creditors of the said X Y so far as the same were known to him had assented to the said deed of arrangement.

(5) The Vendor in pursuance of the said trust in that behalf carried on the business of the said X Y up to and including the —— day of —— 19— and on such last-mentioned day there was owing to the Vendor by the several persons named in the Schedule hereto the several sums of money set opposite their names for goods supplied to them either by the said X Y or the Vendor or both of them and the Vendor as trustee of the said deed of arrangement and in exercise of the trust for sale therein contained has agreed with the Purchaser for the sale to him of the said debts or sums of money at the sum of £——.

NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the sum of £—— upon or before the execution of this deed paid by the Purchaser to the

Vendor (the receipt whereof the Vendor doth hereby acknowledge) the Vendor as trustee hereby ASSIGNS unto the Purchaser ALL THOSE the several debts or sums of money specified in the Schedule hereto respectively due and owing to the Vendor by the several persons named in the Schedule hereto and all interest (if any) due and to become due for the same and the full benefit and advantage thereof TO HOLD the same unto the Purchaser absolutely.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

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